163 U.S. 331

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 161.

ALFRED F. WEBSTER, PLAINTIFF IN ERROR,

vs.

MILO J. LUTHER AND LOUIS ROUCHLEAU.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 22, 1892.

(15,144.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 2, 1895.

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1 STATE OF MINNESOTA, } ss:
County of St. Louis, }

Daniel H. Twomey, being first duly sworn, on oath says that he is one of the attorneys for the plaintiff in error in the case of Alfred F. Webster *vs.* Milo J. Luther *et al.*; that Messrs. Alfred Jaques and Theo. N. Hudson are and have been the attorneys of record for Louis Rouchleau, one of the defendants in error in said action; that Daniel G. Cash and John G. Williams are and have been the attorneys of record for Milo J. Luther, the other defendant in error in said action; that on the 25th day of August, 1892, this affiant served upon said Alfred Jaques, Theo. N. Hudson, Daniel G. Cash, and John G. Williams the citation to which this affidavit is attached and upon which their acknowledgment of service appears; that he knows the said Jaques, Hudson, Cash, and Williams personally and knows them to be the persons who appeared as attorneys for the respective defendants aforesaid; and deponent further saith not.

DANIEL H. TWOMEY.

Subscribed and sworn to by the above-named *David* H. Twomey this 26th day of August, 1892.

[Notarial Seal, St. Louis County, Minn.]

LILLIAN I. FEETHAM,
Notary Public in and for St. Louis County, Minnesota.

2 UNITED STATES OF AMERICA, }
State of Minnesota. }

ALFRED F. WEBSTER, Plaintiff in Error,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants in Error.

The United States of America to Milo J. Luther and Louis Rouchleau, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Alfred F. Webster is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as
3 in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 22nd day of August, A. D. 1892.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of the State of Minnesota.

4 Due and personal service of the foregoing citation in the case of Alfred F. Webster, plaintiff in error, against Milo J. Luther and Louis Rouchleau, defendants in error, and receipt of a copy thereof is this day admitted by us, the undersigned, attorneys of record in said case, on behalf of said defendants in error and each of them.

Dated at Duluth, in the State of Minnesota, this 25th day of August, 1892.

ALFRED JAQUES,
THEO. T. HUDSON,
Counsel for Defendant Rouchleau.
DANIEL G. CASH,
JOHN G. WILLIAMS,
Counsel for Defendant Luther.

5 [Endorsed:] Citation. In U. S. Supreme Court. Alfred F. Webster, plaintiff in error, *vs.* Milo J. Luther and Louis Rouchleau, defendants in error. J. L. Washburn, D. H. Twomey, and Page Morris, att'ys for pl't'ff in error.

6 *Writ of Error to Supreme Court of the State of Minnesota.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Alferd F. Webster, plaintiff in error, and Milo J. Luther and Louis Rouchleau, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said stat-e, on the ground of their being repugnant to the Constitution, treat*y*-s, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commis-ion held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commis--ion, a manifest error hath happened, to the great damage of said Alfred F. Webster, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme
7 Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 20th day of August, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, District of Minnesota.

Allowed by—
JAMES GILFILLAN,
Chief Justice of the Supreme Court of the State of Minnesota.

8 [Endorsed:] 7465. Filed August 20th, 1892. C. P. Holcomb, clerk.

9 *Petition for a Writ of Error.*

UNITED STATES OF AMERICA, }
State of Minnesota. }

To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

Your petitioner, Alfred F. Webster, respectfully represents that on or about the 23d day of January, 1891, he commenced a certain action in the district court of the State of Minnesota in and for the county of St. Louis, in the eleventh judicial district of said State, wherein your petitioner was plaintiff and Milo J. Luther and Louis Rouchleau were defendants; that thereafter such proceedings were had therein as resulted in a final judgment against your petitioner as plaintiff and in favor of said Milo J. Luther and Louis Rouchleau as defendants; that on the 12th day of November, 1891, your petitioner as appellant duly appealed from the judgment of said district court to the supreme court of the State of Minnesota, being the highest court of law or equity of said State; that on the 23d day of November, 1891, the return on appeal was duly filed in the office of the clerk of said supreme court, in the city of St. Paul, in said State, and the cause regularly placed on the calendar of said court for the April term thereof, and on the fourth day of May, 1892, said cause came on for hearing before said supreme court upon your petitioner's appeal aforesaid and was duly submitted; whereupon said court, on the 24th day of May, 1892, rendered its decision and
final judgment against your petitioner and affirmed the
10 judgment of said district court. A transcript of the record of the proceedings in said cause and of the judgment therein,

also the decision of said supreme court rendered therein, are hereunto submitted and hereto attached, marked respectively Exhibits "A" and "B," and made a part hereof.

Your petitioner further respectfully represents that upon the trial of said cause, both in the district and supreme courts aforesaid, the construction of chapter V, title 32, of the Revised Statutes of the United States, and particularly of sections 2289 to 2306, inclusive, thereof, was drawn in question, and that a construction of said sections was and is necessary to a determination of the rights of your petitioner as well as of the defendants aforesaid, and that the judgment and decision of said supreme court were and are against the rights of your petitioner and contrary to the provisions of said sections.

Your petitioner is advised and represents to your honor that said judgment and decision of the supreme court aforesaid are, and each of them is, erroneous, and that he is injured thereby, in that said court adjudges that the defendants in said cause are the owners of the lands described in the plaintiff's complaint, a copy of which is found on page one of Exhibit "A;" that your petitioner claims title to said lands under the laws of the United States aforesaid.

Wherefore your petitioner prays that your honor will allow a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota and the judges thereof, to the end that the record in said action may be removed into the said Supreme Court of the United States, and that the error com-
11 plained of by said plaintiff, petitioner herein, may be examined and corrected; and your petitioner will ever pray.

ALFRED F. WEBSTER, *Petitioner*,
By J. L. WASHBURN AND
TWOMEY & MORRIS,
His Attorneys.

Endorsed: 7465. Petition of Alfred F. Webster for a writ of error. Filed August 20th, 1892. C. P. Holcomb, clerk. J. L. Washburn and Twomey & Morris, attorneys for plaintiff.

12 UNITED STATES OF AMERICA, }
State of Minnesota. }

ALFRED F. WEBSTER, Plaintiff and Appellant,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants and Respondents.

This case coming on to be heard upon the appellant's petition for a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota, and upon examination of said petition and the record of said cause, and desiring to give the petitioner an opportunity to present in the said Supreme Court of the United States the questions presented by said petition and record, it is hereby ordered that a writ of error be allowed to this

court from the said Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of the State of Minnesota.

Endorsed: 7465. Filed August 20th, 1892. C. P. Holcomb, clerk.

13 Supreme Court of the United States.

ALFRED F. WEBSTER, Plaintiff in Error,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants in Error.

Now, on this 26th day of August, 1892, comes the said plaintiff in error and says that in the record, proceedings, and decision of the supreme court of the State of Minnesota in the above-entitled action there was manifest error in this, to wit:

First. The said court erred in giving any effect to the instrument executed by Mary A. Robertson to James A. Boggs, called a power of attorney, and designated as Defendants' Exhibit One in said record.

Second. The court erred in holding that the right acquired under the provisions of section 2306 of the Revised Statutes of the United States is assignable, and that said instrument was valid to effect such assignment.

Third. The court erred in holding that as between the parties an assignment of the right conferred by section 2306 is valid.

Fourth. The court erred in affirming the judgment of the trial court in said action, to wit, the district court of St. Louis county, State of Minnesota.

Fifth. The court erred in ordering judgment to be entered against the plaintiff in error.

14 Sixth. The court erred in giving effect to the instrument of conveyance executed by said Boggs under said power of attorney, through which the defendants in error claim to have derived their title.

Seventh. The court erred in not finding and holding that the said instrument executed by Mary A. Robertson to James A. Boggs, mentioned in the first assignment of error, was invalid, null, and void as being in contravention of the laws of the United States and contrary to public policy.

Eighth. The court erred in not reversing the judgment of said trial court and in not ordering judgment to be entered therein in favor of plaintiff in error and against the defendant- in error.

J. L. WASHBURN,
D. H. TWOMEY AND
PAGE MORRIS,
Attorneys for Plaintiff in Error.

Endorsed: In U. — Supreme Court, Oct. term, 1892. Alfred F. Webster, plaintiff in error, *vs.* Milo J. Luther *et al.*, defendants in error. Assignment of errors. J. L. Washburn, D. H. Twomey and Page Morris, attorneys for plaintiff in error.

15 Know all men by these presents that we, Alfred F. Webster, Herbert W. Coffin, and Amos L. Warner, residents of the State of Minnesota, are held and firmly bound unto Milo J. Luther and Louis Rouchleau in the sum of five hundred dollars ($500), to be paid the said Milo J. Luther and Louis Rouchleau, their certain attorneys, executors, administrators, heirs, or assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of August, 1892.

Whereas lately, at a supreme court of the State of Minnesota, in a suit depending in said court between Alfred F. Webster, plaintiff and appellant, and Milo J. Luther and Louis Rouchleau, defendants and respondents, judgment was rendered against the said Alfred F. Webster, plaintiff and appellant, and the said Alfred F. Webster having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Milo J. Luther and Louis Rouchleau, citing and admonishing them and each of them to be present and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the second Monday in October next: Now, the condition of the foregoing obligation is such that if the said Alfred F. Webster shall prosecute his writ of error to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to be and remain in full force and virtue in law.

AMOS L. WARNER. [SEAL.]
HERBERT W. COFFIN. [SEAL.]

In the presence of—
J. H. COFFIN.
D. H. TWOMEY.

16 STATE OF MINNESOTA, }
County of St. Louis, } *ss:*

Herbert W. Coffin and Amos L. Warner, the persons named in and who executed the foregoing bond, being first duly sworn, doth each for himself say that he is a resident and freeholder of the city of Duluth, in said county and State, and worth the sum and amount of one thousand dollars above his debts and liabilities and exclusive of exemption from execution.

HERBERT W. COFFIN.
AMOS L. WARNER.

Subscribed and sworn to before me this 2nd day of August, 1892.

ISAAC H. COFFIN,
[SEAL.] *Notary Public in and for the County of St. Louis, Minnesota.*

Approved this 20th day of August, 1892.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

STATE OF MINNESOTA, }
County of St. Louis, } *ss:*

On this 2nd day of August, 1892, before me personally appeared Herbert W. Coffin and Amos L. Warner, to me well known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

ISAAC H. COFFIN,
[SEAL.] *Notary Public, St. Louis Co., Minn.*

17 I have the honor to state that I am personally acquainted with the above-named surety and know him to be reliable, and that he is a man of means, possessing property as above stated.
Dated Aug. 5th, 1892.

JOHN LIND,
M. C., 2nd Minn.

Endorsed: 7465. Bond. Filed August 20th, 1892. C. P. Holcomb, clerk.

18 EXHIBIT "A."

In Supreme Court, April Term, 1892.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court.

ALFRED F. WEBSTER, Plaintiff,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants. }

The plaintiff complains against the defendants and alleges and shows to the court as follows:

That the plaintiff is the absolute owner of the following-described real estate and lands, situated in the county of St. Louis and State of Minnesota, to wit:

Lots one (1) and two (2), in section eighteen (18), in township sixty-two (62) north, of range fourteen (14) west, and of the title in fee thereto.

That the said premises are, and for a long time past have been, vacant and unoccupied lands;

That the defendants, Milo J. Luther and Louis Rouchleau, claim to have some right, estate and interest in said premises adverse to this plaintiff, but that the said claims of said defendants are unfounded and void, and without any right whatever, and in truth

and in fact the said defendants have not any estate, right,
19 title, or interest whatever in said lands or premises, or any part thereof, and never had.

Wherefore, plaintiff prays the judgment and decree of the court:

(1.) That the defendants may be required to set forth the nature of their claims, and that all adverse claims of the defendants may be determined by a decree of this court;

(2.) That, by said decree, it be declared and adjudged that the defendants have no estate or interest whatever in or to said land or premises, and that plaintiff's title thereto be adjudged good and valid;

(3.) That defendants be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to this plaintiff;

(4). That the plaintiff have such other and further relief in the premises as to the court seems meet and proper, including his costs and disbursements herein, and thus plaintiff will ever pray.

Dated January 23rd, 1891.

SPENCER & WASHBURN,
Plaintiff's Attorneys.

(Duly verified.)

(Title of Action.)

And now before the court comes the above-named defendant, Milo J. Luther, and for his separate answer to plaintiff's complaint herein denies each and every allegation in said complaint contained, not hereinafter specifically denied, qualified or expressly admitted.

And further answering, this defendant admits that the lands described in said complaint are vacant and unoccupied, and admits that he claims to have some right, estate, and interest in said premises adverse to said plaintiff, but denies that his said
20 claims are unfounded and void, and on the contrary alleges that he is the owner in fee-simple of an undivided three-fourths of said lands.

And further answering, this defendant denies that said plaintiff is the owner in fee-simple or otherwise of said lands or any part thereof.

Wherefore, this defendant demands judgment that he be declared to be the owner in fee of an undivided three-fourths of said lands described in the complaint; and that plaintiff be adjudged and declared to have no estate, interest or lien in or upon the same or any part thereof, and that the plaintiff and all persons claiming through or under him be forever enjoined and debarred from asserting any claim in or to the same adverse to this defendant, and for such other relief as may be just, besides the costs and disbursements of this action.

CASH & WILLIAMS,
Attorneys for Defendant Luther.

(Duly verified.)

(Title of Cause.)

Now comes defendant Louis Rouchleau, and for his separate answer to the complaint of the plaintiff herein, denies each and every allegation in said complaint contained, and each and every part thereof not hereinafter admitted, qualified or explained.

Defendant admits that the lands described in plaintiff's complaint herein are, and for a long time heretofore have been, vacant and unoccupied.

Defendant admits that he claims an interest in the land described in the plaintiff's complaint herein adverse to the plaintiff, and that said interest consists in this, that defendant claims to be, and is the owner in fee-simple of an undivided one-fourth of said real estate.

For a counter-claim against the plaintiff herein, defendant Louis Rouchleau alleges:

1st. That he is the owner in fee-simple of an undivided one-fourth of the following-described real estate situate in the county of
21 St. Louis and State of Minnesota, to wit: Lots one (1) and two (2) in section eighteen (18), in township sixty-two (62) north, of range fourteen (14) west of 4th P. M.

2nd. That all of said lands are vacant and unoccupied.

3rd. That the plaintiff, Alfred F. Webster, claims an estate or interest in or lien upon said lands.

4th. That in truth and in fact the said plaintiff has no title to, interest in or claim upon said lands.

Wherefore defendant Louis Rouchleau asks that the court may adjudge and decree that the plaintiff has no title or interest in said lands, that the defendant is the owner in fee thereof and that he may have judgment for his costs and disbursements herein.

JAQUES & HUDSON,
Attorneys for Defendant Louis Rouchleau.

(Duly verified.)

To which answers the plaintiff replied, denying all the *the* allegations therein not admissions of allegations in the complaint.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

ALFRED F. WEBSTER, Plaintiff,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants. } Settled Case.

The above-entitled cause came on for trial at the regular June, 1891, term of the above-named court, and was tried on the
22 6th day of July, 1891, before the Hon. J. D. Ensign, judge, without a jury, Spencer & Washburn and D. H. Twomey appearing for the plaintiff, and Messrs. Cash & Williams appearing for the defendant Luther, and Jacques & Hudson for the defendant

Rouchleau, whereupon the following evidence was taken and proceedings had, to wit:

Plaintiff offered in evidence certified copy of the application of Mary A. Robinson, to enter the lands in question, dated April 7th, 1887, together with receipt of the register of the local land office, of the same date, certified to under date of June 6th, 1891, by the acting Commissioner of the General Land Office. The same was received without objection, marked Exhibit "A," and being read in evidence, is in words and figures following:

Additional Entry under Section 2306 of the Revised Statutes of the United States.

Application No. 3271.

LAND OFFICE, DULUTH, MINN., *April* 7, 1887.

I, Mary A. Robertson, widow of James A. Robertson, deceased, of Benton county, State of Missouri, being entitled to the benefits of section 2306, of the Revised Statutes of the United States, granting additional lands to soldiers and sailors who served in the war of the rebellion, do hereby apply to enter the lots 1 and 2 of section 18, township 62 north, range 14 west of 4th P. M., Minnesota, as additional to my original homestead on the lot No. 6th of the N. W. ¼, section 3, in township 39 of range 23, which I entered April 17th, 1874, per homestead No. 9816. Final proof made at Boonville, Mo., land office, on the — day of —— 18—, No. —.

her
MARY x ROBERTSON.
mark.

Attest:
H. T. PATTEN.
WILLIS MURRAY.

LAND OFFICE, DULUTH, MINN., *April 7th*, 1887.

I, R. N. Marble, register of the land office at Duluth, Minn.,
23 do hereby certify that Mary Robertson, widow, &c., filed the above application before me for the tract of land therein described, and that she has paid the fee and commissions prescribed by law.

R. N. MARBLE, *Register.*

F. C. 1294.
Exem. 9154.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., *June* 6, 1891.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed certified copy of the application No. 3271, of Mary A. Robertson, filed in this office, in the case of her Duluth, Minnesota, homestead certificate No. 1294, is a true and literal exemplification of the original paper.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

W. M. STONE,
Acting Com. of General Land Office.

Plaintiff next offered in evidence the record of the receiver's final receipt, issued by the receiver of the land office at Duluth to Mary A. Robertson, under date of April 7th, 1887. The same was received without objection, marked Exhibit "B," and being read in evidence, is in words and figures as follows:

Receipt.

Filed April 15th, 1887, at 2 p. m.

Receiver of U. S. Land Office
to
Mary A. Robertson.

Final receiver's receipt No. 1294; application No. 3271, homestead.

RECEIVER'S OFFICE, DULUTH, MINN., *April* 7, 1887.

Received of Mary A. Robertson the sum of two dollars —— cents, being the balance of payment required by law for the entry of lots one (1) and two (2) of section 18, in township 62 N. of range 14 W., 4th P. M., containing $92\frac{55}{100}$ acres, under section 2291 of the Revised Statutes of the United States.

24

$2.00. E. G. SWANSTROM, *Receiver.*

Plaintiff next offered in evidence the record of patent, United States of America to Mary A. Robertson, dated September 21, 1888, and recorded February 11, 1889, in the office of the register of deeds of St. Louis county, Minnesota. The same was received without objection and, being marked Exhibit "C" and read in evidence, is in words and figures following:

No. 1293.

United States of America
to
Mary A. Robertson. } Patent.

Filed for record Feb. 11, 1889, at 9 o'clock a. m.

Homestead certificate No. 1294; application 3271.

UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Duluth, Minnesota, whereby it appears that, pursuant to the act of Congress approved May 20th, 1862, "to secure homesteads to actual

settlers on the public domain," and the acts supplemental thereto the claim of Mary A. Robertson has been established and duly consummated in conformity to law for the lots numbered one and two of section eighteen, in township sixty-two north, of range fourteen west, of the fourth principal meridian, in Minnesota, containing ninety-two acres and fifty-five hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office by the surveyor general:

25 Now, know ye, that there is therefore granted by the United States unto the said Mary A. Robertson, the tract of land above described, to have and to hold the said tract of land with the appurtenances thereof unto the said Mary A. Robertson, and to *his* heirs and assigns forever.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-first day of September, in the year of our Lord one thousand eight hundred and eighty-eight and of the Independence of the United States the one hundred and *thirtieth*.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary*.
[SEAL G. L. O.] ROBERT W. ROSS,
Recorder of the General Land Office.

Recorded, vol. 3, page 265.

Plaintiff next offered in evidence quitclaim deed of bargain and sale, Mary A. Robertson, widow, to Alfred F. Webster, the plaintiff, dated October 17th, 1890, recorded October 22nd, 1890, in the office of the register of deeds of St. Louis county, Minnesota, which, being received in evidence, marked Exhibit "D," and being read, is in words and figures as follows:

This indenture, made this seventh day of October, in the year of our Lord one thousand eight hundred and ninety, between Mary A. Robertson, widow, party of the first part, and Alfred F. Webster, party of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of fifty dollars to her in hand paid by the said party of the second, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, release, and quitclaim to the

26 said party of the second part, his heirs and assigns forever, all the tracts or parcels of land, lying and being in the county of St. Louis, and State of Minnesota, described as follows, to wit; Lots one (1) and two (2), in section eighteen (18), in township sixty-two (62) north of range fourteen (14) west of the fourth principal meridian.

To have and to hold, the above quitclaimed premises, together with all and singular the heredit-ments and appurtenances thereunto be-

longing, or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof, the said party of the first part has hereunto set her hand — seal the day and year first above written.

her
MARY A. x ROBERTSON. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
F. C. ROBERTSON.
MARY F. HOBBS.

STATE OF MISSOURI, } ss:
County of Benton, }

On this 17th day of October, A. D. 1890, before me, a judge and clerk of probate court within and for said county, personally appeared Mary A. Robertson, widow, to me personally known to be the person described in, and who executed the foregoing deed, and acknowledged that she executed the same as her free act and deed.

NEWBERRY HOBBS, SR.,
Judge and ex Officio Clerk of Probate Court,
Benton County, Missouri.

OFFICE OF REGISTER OF DEEDS, } ss:
County of St. Louis, State of Minnesota, }

I hereby certify that the within deed was filed in this office for record on the 22nd day of October, A. D. 1890, at 1.45 p. m., and was duly recorded in Book 30 of Deeds, on page 27 621.

AMOS SHEPARD,
Register of Deeds,
By J. A. SWANSON, *Deputy.*

Taxes paid and transfer entered this 27th day of October, A. D. 1890.

GEO. N. LA VAQUE,
County Auditor,
By ALEX. SCHULTZ, *Deputy.*

(Plaintiff here rested his case.)

The defendants then offered in evidence, to support the issues on their part, the record of the power of attorney, Mary A. Robertson to James A. Boggs, dated April 28th, 1880, recorded April 8, 1887, in the office of the register of deeds of St. Louis county, Minnesota; to which the plaintiff objected *to* on the ground that the same is irrelevant, incompetent and immaterial; contains no reference to or description of the premises involved in this action; that the same tends to prove a transaction in fraud of and in contravention of the laws of the United States, and that the said instrument, upon its face, is contrary to law, against public policy, fraudulent and void; which objection was overruled by the court; to which ruling

the plaintiff duly excepted; said instrument, being received, marked Defendants' Exhibit 1, and being read in evidence, is in words and figures following:

(Book "B," Powers, page 432. Copy.)

Power to Transfer.

Filed April 8th, 1887, 9 a. m.

Mary A. Robertson
to
James A. Boggs.

Know all men by these presents that I, Mary A. Robertson, of the county of Benton, State of Missouri, do hereby make, constitute and appoint James A. Boggs my true and lawful attorney, hereby authorizing and empowering my said attorney to sell upon such terms as to him shall seem meet, any lands which I now own,
28 either in law or equity and obtained by me as an "additional homestead" under the provisions of section 2306 of the Revised Statutes of the United States, and to sell any such lands as I may hereafter acquire under said acts, and to receive the purchase-money, or other consideration therefor, and upon such sale to make, sign, seal and deliver in my name all such deeds or other assurances in the law therefor as to him shall seem meet and necessary.

And I further authorize and empower my said attorney to receive, accept and take possession of all lands hereinbefore mentioned, and to prosecute and defend at his own cost, any suit or action respecting the same or for the breach of any contract in relation thereto, or for any trespass thereupon, or injury thereto, of any nature or description whatsoever.

And my said attorney is hereby authorized to sell said lands, or my interest therein, and to make any contract in relation thereto which I might make if present, and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto, and I hereby release to my said attorney all claim to any of the proceeds of any such sale, lease, contract or damages.

And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers, hereby ratifying and conforming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents.

In witness whereof, I, the said Mary A. Robertson, in token of *her* release of all rights of dower and homestead exemption in the premises, have hereunto set *our* hands and seals this 28th day of April, 1880.

her
MARY A. x ROBERTSON. [SEAL.]
mark

Signed, sealed, and delivered in presence of—
H. T. PATTEN.
WILLIS MURRAY.

STATE OF MISSOURI, } ss:
County of Benton, }

On this 28th day of April, A. D. 1880, before me, a clerk of the circuit court, personally appeared Mary A. Robertson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

E. T. RHEA,

[SEAL.] *Clerk Circuit Court, Benton County, Mo.*

STATE OF MINNESOTA, } ss:
County of St. Louis, }

I, Amos Shephard, register of deeds of said county, do hereby certify that the annexed is a true and correct copy of the records in my office, as found in Book "B" of Powers, on page 432; that I have compared such copy with the original record and that it is a correct transcript therefrom.

AMOS SHEPHARD, [SEAL.]
Register of Deeds.

Duluth, Minn., Feb. 14, 1891.

Defendants next offered in evidence a warranty deed, Mary A. Robertson, by James A. Boggs, her attorney-in-fact, to Louis Rouchleau, dated April 7th, 1887, recorded April 15, 1887, in the office of the register of deeds of St. Louis county, Minnesota, the same being executed by said Boggs under the instrument last above set forth; to which the plaintiff objected on the grounds that the same was irrelevant, incompetent and immaterial, no foundation laid for its introduction; that the same does not appear to have been executed by Mary A. Robertson, or by any person having authority to execute the same in her behalf; which objection was overruled
30 by the court; to which ruling the plaintiff duly excepted; and the same being received in evidence, marked Defendants' Exhibit "2," and read, is in words and figures following:

Filed for record April 15, 1887, at 1.30 p. m.

Mary A. Robertson }
to
Louis Rouchleau. }

This indenture, made this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-seven, between Mary A. Robertson (widow), party of the first part, and Louis Rouchleau, of Duluth, Minn., party of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of one hundred dollars to her in hand paid by the said party of the second part, the receipt whereof is here*of* acknowledged, do hereby grant, bargain, sell, and convey unto the said party of

the second part, his heirs and assigns forever, all that tract or parcel of land lying and being in the county of St. Louis and State of Minnesota, described as follows, to wit:

An undivided one-half (½) of lots 1 and 2 of section eighteen (18) in township sixty-two (62) north of range fourteen (14) west of the 4th P. M.,

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever. And the said Mary A. Robertson (widow), party of the first part, for herself and her heirs, executors, and administrators, do hereby covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises, in the quiet and peaceable possession of the party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

31 In testimony whereof, the said party of the first part hereunto set her hand and seal the day and year first above written.

MARY A. ROBERTSON, [SEAL.]
By JAMES A. BOGGS,
Her Attorney-in-fact.

Signed, sealed, and delivered in presence of—
FRANK A. WIXSON.
M. A. DELAM.

STATE OF MINNESOTA, } *ss:*
County of St. Louis, }

I, O. H. Simonds, a notary public within and for said county, do hereby certify that on this seventh day of April, A. D. 1889, personally came before me James A. Boggs, to me well known as the person who executed the foregoing deed on behalf of Mary A. Robertson, and acknowledged that he executed the same freely and voluntarily as the free act and deed of Mary A. Robertson.

O. H. SIMONDS,
[SEAL.] *Notary Public, St. Louis County, Minn.*

Defendants next offered in evidence warranty deed, Mary A. Robertson, by James A. Boggs, her attorney-in-fact, to Milo J. Luther, dated April 7th, 1887, recorded April 15, 1887, in the office of the register of deeds of St. Louis county, Minnesota; to which the plaintiff objected on the grounds that the same was incompetent, irrelevant, and immaterial, no foundation laid for its introduction; that the same does not appear to have been executed by Mary A. Robertson, or by any person having authority to execute the same

in her behalf; which objection was overruled by the court; to
32 which ruling the plaintiff duly excepted; the same being received in evidence, marked Defendants' Exhibit "3," and being read, is in words and figures as follows:

Filed for record April 15, 1887, at 1.30 p. m.

Mary A. Robertson
to
M. J. Luther.

This indenture, made this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-seven, between Mary A. Robertson (widow), party of the first part, and Milo J. Luther, of Streator, Illinois, party of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of one hundred dollars to her in hand paid by the said party of the second part, the receipt whereof is here*of* acknowledged, does hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land lying and being in the county of St. Louis and State of Minnesota, described as follows, to wit:

An undivided one-half (½) of lots 1 and 2 of section eighteen (18) in township sixty-two (62) north of range fourteen (14) west of the 4th P. M.,

To have and to hold the same, together with all the heriditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever. And the said Mary A. Robertson (widow), party of the first part, for herself, her heirs, executors, and administrators, does hereby covenant with the said party of the second part, his heirs and assigns, that she is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises, in the quiet and peaceable possession of the party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

33 In testimony whereof, the said party of the first part hereunto set her hand and seal the day and year first above written.

MARY A. ROBERTSON, [SEAL.]
By JAMES A. BOGGS,
Her Attorney-in-fact.

Signed, sealed, and delivered in presence of—

FRANK A. WIXSON.
M. A. DELAM.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

I, O. H. Simonds, a notary public within and for said county, do hereby certify that on this seventh day of April, A. D. 1889, personally came before me James A. Boggs, to me well known as the person who executed the foregoing deed on behalf of Mary A. Robertson, and acknowledged that he executed the same freely and voluntarily as the free act and deed of Mary A. Robertson.

O. H. SIMONDS,
[SEAL.] *Notary Public, St. Louis County, Minn.*

The defendant- next offered in evidence a warranty deed executed subsequently to the above deeds, Louis Rouchleau to defendant Milo J. Luther, for an undivided one-fourth of the above-described premises, which deed is executed in due form and recorded in the office of the register of deeds of said St. Louis county, Minnesota; to which the plaintiff objected on the grounds that the same was incompetent and immaterial; which objection being overruled, the same was read in evidence and marked Defendants' Exhibit "4."

Defendants then rested, and the cause was thereafter, upon written briefs, submitted to the court, who, on the 7th day of October,
34 1891, made his findings of fact and conclusions of law, together with his memorandum thereon, and filed the same in the office of the clerk of said court on said day, which findings are as follows:

(Title of Cause.)

This cause was tried by the court, without a jury, at the June term of said court, 1891, on the 6th day of July, during said term, and was argued by counsel, and the court being fully advised in the premises, makes and files the following findings of fact and conclusions of law:

Findings of Fact.

1st. The defendant, Louis Rouchleau, is the owner in fee-simple of the undivided one-fourth of the lands in the complaint and answer described.

2nd. The defendant, Milo J. Luther, is the owner in fee-simple of the undivided three-fourths of the land described in the complaint and answer.

3rd. That said lands are vacant and unoccupied.

4th. That the plaintiff has no right, title, or interest in or to any of the lands described in the pleadings in this action.

Conclusions of Law.

That defendants are entitled to judgment against the plaintiff adjudging the title of all of said lands to be in the defendants, free

and clear from any claim of the plaintiff, and for their costs and disbursements of this action.

October 7th, 1891.

By the court:

J. D. ENSIGN, *Judge.*

35 *Memorandum.*

The case was tried at the June term, 1891. At the same term the case of Henry R. King *vs.* John S. Pillsbury *et al.*, was tried before Hon. O. P. Stearns, who has handed me his decision and memoranda.

The only question in this case, as in that, is, Did Boggs have authority to act as attorney-in-fact of Jones (Robertson) in making the conveyances to the defendants?

I fully concur in the opinion of Judge Stearns in that case, and refer to it as a memorandum in this case, and I only desire to call attention to one *one* point which was not dwelt upon as fully as I think its importance demands. Judge Stearns says: "It seems to me the act of 1872 known as the 'soldiers' additional act,' is an act independent of the homestead act of 1862, except in so far as the act of 1862 is referred to in and made to limit the operation of section 2304, Rev. Stats. U. S., and the reference and limitation in no manner affects the operation of section 2306."

In the case of Rose *vs.* Wood and Lumber Company, Patterson, J., cites the passage of section 2306, April 4th, 1872, says it was amended June 8th, 1872, by inserting the words "contiguous to the land previously entered," and says: "A year later this restriction was removed and the section as originally passed was restored."

In the case of Knight *vs.* Leary, 54 Wis., 459, the court uses substantially the same language.

A careful comparison of the three acts will show that another amendment was made by the act of March 3rd, 1873, that has in my mind an important bearing upon the proposition cited from Judge Stearns' opinion and strengthens the position taken by him and the supreme court of California.

Section 2306 (or section 2 of the act of 1872) as passed April 4th, 1872, reads as follows:

"That any person entitled, under the provisions of the foregoing section, to enter a homestead, who may have heretofore entered under the homestead laws, a quantity of land less than one
36 hundred and sixty acres, shall be permitted to enter under the provisions of this act so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." Vol. 17 U. S. Stat. at Large, 49.

The land could be entered anywhere, but must be entered under the provisions of this act.

Section one of the act provided for compliance with the provisions, so far as procedure was concerned, of the homestead act of 1862.

The Land Department was then placed in a position where this

extra amount on land, given to equalize the homesteads of soldiers and sailors who had already entered less than one hundred and sixty acres, could be located anywhere, but it must be entered "under the provisions of this act." The soldier or sailor who had entered say eighty acres, and who was living upon it, could not take eighty acres more situated apart from the land already taken and enter it in compliance with the act of 1862.

This became apparent as soon as the act was passed, and Congress at once sought a remedy, and on the 8th day of June, 1872, amended the act of April 4th, 1872, by passing the whole act over, just as it was, except as to section two, and in that was inserted the words "contiguous to the land previously entered" so then the section read as follows: "That any person entitled, under the provisions of the foregoing section, to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter, under the provisions of this act, so much land contiguous to the tract embraced in the first entry as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." 17 Stats. at Large, 333.

The act was then consistent in its various provisions, but was still inoperative as a provision to equalize the homesteads taken by soldiers and sailors before, and after the act of 1872, as it was found impossible for settlers on homestead lands to enter contiguous lands, as they had in a majority of cases been already taken by others.

Again Congress was called upon to make provisions that
37 would equalize these homestead rights and give to every soldier and sailor one hundred and sixty acres of land.

The trouble was caused by the words "under the provisions of this act." To retain these words, the amendment by inserting the words "contiguous to the lands previously entered" was made, but still the provision was useless for the purpose for which it was passed, and the only way it could be remedied by Congress, when it *it* was again confronted by the difficulty, was to strike out both of these clauses and cut loose entirely from the homestead act in the manner of making the entry. That Congress did by this amendment of section two, so it would read as follows: "That any person entitled under the provisions of the foregoing sections to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." 17 Stats. at. L., 605.

In section two, as first enacted and in the first amendment, Congress endeavored to conform the procedure of this equalization to the act of 1862. This was found to be impossible, and when Congress finally considered the question, it was found necessary to eliminate all of the methods of procedure under the homestead act of 1862 and allow the entry to be made without regard to and entirely independent of that act.

J. D. ENSIGN, *Judge.*

Memorandum of Judge Stearns in the Case of King vs. Pillsbury et als., Referred to and Made a Part of the Above Memorandum.

"One Jones entered forty acres of land under section 2289, Rev. Stats. U. S., being the general homestead law of 1862. On the passage of section 2306, Rev. Stats. U. S., in 1872, he became entitled to enter one hundred and twenty acres additional. On the
38 18th day of January, A. D. 1883, Jones gave to Boggs an instrument, under seal and duly acknowledged, containing a power of attorney to enter said additional one hundred and twenty acres, and also a power of attorney to sell and convey the same. This same instrument was in terms made irrevocable, and Boggs was in terms released from accounting to Jones for any of the proceeds of such sale.

December 13th, 1888, Jones, through Boggs, his attorney, entered the lands described in the complaint, and September, 1890, the land was patented to Jones. Prior to the first of January, 1889, Boggs, as attorney-in-fact of Jones, had executed and delivered to the defendants warranty deeds of undivided portions of said lands, amounting in all to the whole thereof, and said power of attorney and all said deeds were duly recorded prior to January 1st, 1890.

On September 30th, 1890, Jones quitclaimed to plaintiff all his right and interest in and to the lands.

The only question in this case is, Did Boggs have authority to act as the attorney-in-fact of Jones in making the conveyances to defendants? The Interior Department has uniformly held that a right given to a soldier who had taken a homestead of less than 160 acres, by section 2306 Rev. Stats. U. S., to make an additional entry was a purely personal right and unassignable, and the supreme court of Washington Territory, in the case of Mackintosh *vs.* Renton, 19 Pac. Rep., 144, while in the case of Mullen *vs.* Wine, 26 Fed. Rep., 207, Brewer, then U. S. circuit judge, held the right was assignable, and that decision has been followed by one of the district courts in this State.

If the right of the soldier under said section 2306, is held to be assignable, it removes all valid objections to the validity of the deeds made by Boggs, as attorney-in-fact of Jones, to the defendants, but, high as is the authority of the U. S. circuit court *of the U. S.*, when presided over by so able a judge as Brewer, now one of the U. S. Supreme judges, sustained as I am by the able decisions of three Secretaries of the Interior, and other Interior Department
39 officers, I must hold in accordance with my own views, that the right as such was a purely personal right, would not descend to heirs, could not be levied on for debt, and was unassignable.

Nobody, I think, would claim that the right given by section 2304, Rev. Stats. U. S., is assignable; and yet the nature of the right, it seems to me, is precisely the same as that given by 2306.

Holding that the right given by section 2306, while inherent as such, unexercised in Jones, was not assignable, is by *on* means equivalent to holding that Jones could not, before he had exercised

that right, give a power of attorney which would give valid authority to convey the lands acquired by the exercise of that right when exercised.

There is no question that such an instrument as that given by Jones to Boggs, if relating to lands entered under section 2289, would be void as against public policy. But why void as against public policy? Because section 2291 of the same act provides that in making final proof the homesteader shall make an affidavit that no part of such land has been alienated, &c. An agreement, then, such as that entered into between Jones and Boggs, would in effect, if relating to land entered as a homestead under the general homestead law of 1862, be an agreement that Jones should, when he came to make his final proof, perjure himself, and as all persons are conclusively presumed to know the law, they would be presumed to know that they were entering into such an agreement, that they were entering into an immoral contract, and it is contrary to public policy to give any validity to such contracts.

The question then arises, whether the proceedings of section 2291, passed in 1862, apply to entries under section 2306, passed in 1872. If it does, then I am clear that the instrument executed by Jones to Boggs was void; if it does not, I know no statute or principle of law that invalidates it.

As will appear, courts of high authority differ in opinion as to the requirements of the law, but Jones and Boggs are conclusively presumed to have known which of the courts is right and which
49 wrong, and if the courts holding that section 2291 applies to entries under section 2306, then the agreement between Jones and Boggs was immoral and void; if otherwise, then the agreement was not immoral, and it is not against public policy to give it validity and enforce it.

On this question I am referred to just two cases; by the plaintiff to the case of Nichols *vs.* Council, 9 S. W. Rep., 305, a case decided by the supreme court of Arkansas, in which it is held that section 2291 does apply to entries under section 2306; and by the defendants, to the case of Rose *vs.* Wood and Lumber Co., 73 Cal., 385, where it is as clearly held that section 2291 does not apply to entries under section 2306.

The question as it arises in these cases, and in the case at bar, being as to the validity of conveyances made after the title has confessedly passed out of the United States, is clearly one for the courts and not one for the Interior Department to adjudicate.

The bent of my mind inclines me to hold with the California court.

It seems to me, the act of 1872, known as the soldiers' additional act, is an act independent of the homestead act of 1862, except in so far as the act of 1862 is referred to and made to limit the operation of section 2304, Rev. Stats. U. S., and that that reference and limitation in no manner affects the operation of section 2306.

I do not perceive the consistency in holding, as all other authorities do, that the provisions of the law of 1862, requiring actual set-

tlement, do not apply to settlements made under section 2306, while the provision requiring an affidavit of non-alienation does apply.

I am inclined to think the idea that section 2291 applies to entries under section 2306 has its root in the thought that some general principle of public policy requires that it should. I think otherwise. I think, as a rule, ex-soldiers are perfectly competent to be trusted with the management of their own affairs. I do not think the reasons why such affidavit should be required of persons making entries under sections 2289 and 2304, the leading purposes of which are to furnish men homesteads on which they are
41 to reside with their families, apply to entries under section 2306, the leading and only purpose of which seems to be, not to furnish homes for men and their families, but to compensate worthy soldiers, who have already been provided with homesteads, for not having been allowed to take as much land for that purpose as is now allowed to be taken.

It may be claimed that, admitting the statute did not require any affidavits of non-alienation, yet rules established by the Interior Department, and which it had lawful authority to establish, did require such affidavit and that that was effective to make the Jones-Boggs contract as immoral as if the statute required it, to which I make answer that I have no judicial knowledge that any such rules were ever established or promulgated, and if I had, there is no presumption that Jones and Boggs had any notice of any such rule, which would be necessary to make their contract immoral.

O. P. STEARNS, *Judge.*

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

ALFRED F. WEBSTER, Plaintiff, }
vs. }
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants. }

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that the above and foregoing is a case containing all the evidence given and all the evidence offered upon the trial of said action, together with the objections of either party thereto, and the ruling of the court thereon, and the exceptions to such ruling, together with the findings and memorandum
42 of the court, and the judge of said court may sign and allow the same as a settled case herein, the same to be used upon the appeal from the judgment entered in said action.

Dated October 21st, 1891.

SPENCER & WASHBURN,
Attorneys for Plaintiff.
JAQUES & HUDSON AND
CASH & WILLIAMS,
Attorneys for Defendants.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

ALFRED F. WEBSTER, Plaintiff,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants.

The above and foregoing case having this day been examined by me and found to be conformable to the truth, and containing all of the evidence given at the trial and all of the evidence offered thereat, together with the objections of either party, the rulings of the court thereon, and the exceptions to such rulings, together with the findings and memorandum of the court, the same is hereby allowed and signed as a settled case therein, pursuant to the stipulation of the parties attached thereto.

Dated and signed this 12th day of November, 1891.

J. D. ENSIGN,
Judge District Court.

43 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

ALFRED F. WEBSTER, Plaintiff,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants. } Judgment.

This cause having come on for trial before the court, without a jury, before the Hon. J. D. Ensign, one of the judges of said court, at the June term of said court, on the 6th day of July, 1891, and the court having made and filed its findings of fact and conclusions of law and order for judgment, and on motion of Jacques & Hudson, and Cash & Williams, attorneys for defendants,—

It is adjudged and decreed that the defendants are the owners in fee-simple of all of the lands described in the complaint herein, in the proportions following: said defendant Milo J. Luther is the owner of the undivided three-fourths, and said defendant Louis Rouchleau of the undivided one-fourth thereof, which said lands are described as follows, to wit:

Lots one (1) and two (2) in section eighteen (18), township sixty-two (62), north of range fourteen (14) west, situate in the county of St. Louis and State of Minnesota, and that the plaintiff, Alfred F. Webster, has no estate, title or interest in or to said lands, or any part thereof.

It is further adjudged that the defendants Milo J. Luther and Louis Rouchleau recover of the plaintiff, Alfred F. Webster, the sum of thirteen dollars and fifteen cents, their costs and disbursements herein.

Witness the Honorable J. D. Ensign, one of the judges of said court, at Duluth, Minnesota, this 17th day of October, 1891.

D. J. SINCLAIR, *Clerk.*

44 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

ALFRED F. WEBSTER, Plaintiff, }
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Defendants. }

To Messrs. Cash & Williams and Jacques & Hudson, attorneys for the above-named defendants, and to D. J. Sinclair, clerk of said district court:

Please take notice, that the above-named plaintiff, Alfred F. Webster, appeals to the supreme court of the State of Minnesota, from the judgment of the district court of St. Louis county, entered herein and docketed in the office of the clerk of said court on the 17th day of October, 1891, in favor of said defendants and against said plaintiff, adjudging the defendants to be the owners of the premises described in the complaint in this action, and that the plaintiff has no estate, interest or title in or to said lands or any part thereof, and further adjudging that the defendants recover of the plaintiff the sum of thirteen and $\frac{15}{100}$ dollars as their costs and disbursements, which appeal is taken from said judgment and the whole thereof.

Dated November 12th, A. D. 1891.

SPENCER & WASHBURN,
Attorneys for Plaintiff.

Due service of the within notice admitted this 12th day of November, 1891.

CASH & WILLIAMS,
Attorneys for Defendant Luther.
JACQUES & HUDSON,
Attorneys for Defendant Rouchleau.
D. J. SINCLAIR,
Clerk of District Court,
By J. S. MOODY, *Deputy.*

Undertaking on appeal duly filed in clerk's office.

Endorsed: Transcript of original record. Filed March 10th, 1892. C. P. Holcomb, clerk.

45 EXHIBIT "B."

ALFRED F. WEBSTER, Appellant,
vs.
MILO J. LUTHER *et al.*, Respondents.

MAY 24, 1892.

The right given by section 2306, U. S. Rev. Stats., assignable—The right given by section 2306 of the Revised Statutes of the United States to enter additional lands sufficient to make up, with the original homestead entry, one hundred and sixty acres is assignable.

GILFILLAN, *C. J.:*

This is the case of a right to make an additional entry of lands given to a soldier homesteader under section 2306 of the Revised Statutes of the United States, being section 2 of the act of April 4, 1872, entitled "An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States," as that section was amended by the acts of June 8, 1872, and March 3, 1873. Taking the instrument executed by Mary A. Robertson, the person entitled to the additional entry to James A. Boggs, to have been intended to be
46 not merely a power of attorney to sell and convey the lands after they should be located, but also as an assignment of the right to make the entry, so that the power to convey was irrevocable, the case presents directly the question, May such right to enter be assigned so as to bind the parties? That the Government is bound by such an assignment, so that the assignee may make the entry in his own name, is another question. The rulings of the Land Department seem to be uniform to the effect that in administering its business it need take no account of such assignments.

That the right given by the section referred to is in the nature of property, whatever restrictions Congress from motives of policy may have put upon it, cannot be doubted. And as such it is subject to the full power of the owner to dispose of it unless that power is expressly or impliedly limited. The general homestead law, the act of May 20, 1862, does not expressly prohibit alienation before the patent shall issue, but its requirements in respect to residence and cultivation and the making of proofs and affidavits are such as to compel the conclusion that until the application for the patent is allowed the right given by it shall be inalienable. The homesteader cannot without perjury, make, after alienation, the affidavit required of him, upon such application. Section 1 of the act of 1872 requires compliance with the provisions of the act of 1862, except as therein modified. Section 2 read "that any person entitled under the provisions of the foregoing section to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter under the provisions of this act, so much land as

when added to the quantity previously entered shall not exceed one hundred and sixty acres." This act was amended by the act
47 of June 8, 1872, the only change in section 2 being the insertion after the words "so much land" of the words "contiguous to the tract embraced in the first entry." Why this change was made unless to make the section harmonize with the clause "to enter under the provisions of this act" it is difficult to conceive. At any rate after that amendment, and possibly before it, with the clause just quoted in the section, the right given would, in nine cases out of ten, be useless, as the homesteader might not be able to comply with the requirements of the section. By the act of March 3, 1873, the section was again amended by striking out the words "under the provisions of this act" and the words "contiguous to the tract embraced in the first entry." As so amended the section certainly permitted what for convenience we may call the "additional right" to be located upon any unappropriated public lands wherever situated. And as so amended there was nothing in it to indicate that in respect to the additional right, compliance with the provisions of section one was required. The striking out of the words "under the provisions of this act" is significant. Apparently at least those words made it necessary to do, in order to secure the additional land, what is required by section one, to secure the first or original entry, to wit, compliance with the provisions, except as modified, of the act of 1862. The retention of those words might have gone to defeat the purpose of Congress to permit the "additional right" to be located on any unappropiated lands, however distant from the first entry. We think the clauses were struck out so that the right to the additional land should depend solely on the right to make an entry under section one and the fact that the first entry was of less than one hundred and sixty acres and so
48 that those conditions existing, nothing should be required of the homesteader beyond claiming the additional right. There being nothing in the terms of the section requiring the things specified in the act of 1862, to wit, the making of proofs, affidavits, &c., is there anything in the policy of the Government in respect to the subject-matters of the various acts referred to which raises the presumption that Congress intended any of the requirements of the act of 1862 to apply to the "additional right"? or intended the feature of inalienability impressed on the homestead entered under the act of 1862, or the first section of the act of 1872, should attach to the "additional right"?

The purpose of Congress in giving the right to enter and acquire a homestead under the act of 1862 and the first section of the act of 1872, was not merely to confer a benefaction on the citizen, or discharged soldier or sailor. There was also the purpose, to secure so far as possible a *bona fide* settler on the public lands, to promote the peopling and cultivation of those lands. It was to prevent the evasion of this result, that the person applying to enter a homestead is required to make affidavit, that the application is made for his or her exclusive use and benefit, for the purpose of actual settlement and cultivation and not either directly nor indirectly for the use

or benefit of any other person, and on applying for the patent to make proof of residence on and cultivation of, the land for five years and an affidavit that no part of the land has been alienated, and it is provided that the land shall not be taken for debts, and that upon any change of residence or abandonment of the land for more than six months the lands shall revert. The end in view was the
49 peopling vacant public lands with settlers owning and cultivating their own homes.

To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1873. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the Government whether the original donee should continue to hold it or should transfer it to another. Or rather, as policy requires the peopling of the vacant public lands, and as it could not be expected or desired that the homesteader should abandom his first entry to settle upon the additional land, it would be more for the interest of the Government that he should be able to assign his additional right so that it might come to be held by some one who would settle upon the lands.

We are therefore of opinion, that as between the parties an assignment of the right is valid.

Judgment affirmed.

Endorsed: Opinion and syllabus. Filed May 24th, 1892. C. P. Holcomb, clerk.

50 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1892.

ALFRED F. WEBSTER, Appellant,
vs.
MILO J. LUTHER and LOUIS ROUCHLEAU, Respondents. } No. 123.

Pursuant to an order of court duly made and entered in this cause on the tenth day of June, A. D. 1892, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondents above named do have and recover of said Alfred F. Webster, appellant herein, the sum and amount of seventy-four dollars ($74.00), costs and disbursements

in this cause in this court, and that said respondents have execution for the enforcement thereof.

Dated and signed this 10th day of June, 1892.

By the court.

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing paper, book, and briefs, etc	39 00
Clerk's fees, supreme court	10 00
Execution and return	
Filing mandate and docketing transcript	
— affidavits and acknowledgments	
Postage	
Copying return for printer	
	$74 00

51 [Endorsed:] 7465. State of Minnesota, supreme court. Alfred F. Webster, appellant, *vs.* Milo J. Luther *et al.*, respondents. Transcript of judgment.

Endorsed: Filed June 10th, A. D. 1892. C. P. Holcomb, clerk. —— ——, attorney for —. Page No. 128, Q Book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Seal of Supreme Court, Minnesota.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 10th day of June, A. D. 1892.

C. P. HOLCOMB, *Clerk.*

52 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1892.

ALFRED F. WEBSTER, Appellant, *vs.* MILO J. LUTHER and LOUIS ROUCHLEAU, Respondents.	No. 123. Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1892, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here

and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondents aboved named have judgment accordingly.

Entered June 10th, A. D. 1892.

By the court.

Attest:

[Seal of Supreme Court, Minnesota.]

C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

C. P. HOLCOMB, *Clerk.*

Attest:

53 [Endorsed:] No. 7465. State of Minnesota, supreme court. Alfred F. Webster, appellant, *vs.* Milo J. Luther *et al.*, respondents. Copy of order for judgment.

Endorsed: Filed June 10, A. D. 1892. C. P. Holcomb, clerk. Entered on page 86, Book "I."

54 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1892.

MAY 4, A. D. 1892—Wednesday morning, 9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

ALFRED F. WEBSTER, Appellant, *vs.* MILO J. LUTHER *et al.*, Respondents. } Cal. No., 123; Reg. No., 7465.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

Attest:

C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest:

[Seal of Supreme Court, Minnesota.]

C. P. HOLCOMB, *Clerk.*

55 [Endorsed:] 7465. State of Minnesota, supreme court. Alfred F. Webster, appellant, *vs.* Milo J. Luther *et al.*, respondents. Copy of minutes of argument.

Endorsed: Filed June 10th, A. D. 1892. C. P. Holcomb, clerk.

56 [Endorsed:] No. 7465. State of Minnesota, supreme court. Alfred F. Webster, appellant, against Milo J. Luther *et al.*, respondents. Judgment-roll.

Endorsed: Filed June 10th, 1892. C. P. Holcomb, clerk. ——— ———, attorney for —.

57 STATE OF MINNESOTA:

OFFICE OF THE CLERK OF THE SUPREME COURT.

Answer of the Judges of the Supreme Court of the State of Minnesota in the Within Writ Mentioned.

To the Supreme Court of the United States:

The judges of the supreme court of the State of Minnesota, by the clerk of that court, hereby certify and return to the annexed writ of error—

That the annexed copy of record contains, comprises, and constitutes a true and complete transcript of the final judgment, judgment-roll, record, and proceedings had in the supreme court of the State of Minnesota in the case between Alfred F. Webster, plaintiff in error, and Milo J. Luther and Louis Rouchleau, defendants in error, including also copy of the petition for said writ of error and of the bond given in that behalf, allowance of said writ of error, and approval of said bond and the original citation and proof of service thereof, original writ, and copy of the assignments of error as the same remain of record and on file in the office of the clerk thereof.

In testimony whereof the clerk of the supreme court of the State of Minnesota has hereunto subscribed his name and has caused the seal of that court to be hereunto duly affixed, at his office, at the capitol, at St. Paul, in the State of Minnesota, on the second day of September, A. D. 1892.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB,
Clerk of the Supreme Court of Minnesota.

[Endorsed:] No. —. Alfred F. Webster, plaintiff in error, *vs.* Milo J. Luther & Louis Rouchleau, defendants in error. Return to Supreme Court of the United States.

Endorsed on cover: Case No. 15,144. Minnesota supreme court. Term No., 161. Alfred F. Webster, plaintiff in error, *vs.* Milo J. Luther and Louis Rouchleau. Filed September 22d, 1892.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 161.

ALFRED F. WEBSTER,
Plaintiff in Error,

vs.

MILO J. LUTHER and LOUIS ROUCHLEAU,
Defendants in Error.

In Error to the Supreme Court of the State of Minnesota.

Brief for Plaintiff in Error.

DANIEL H. TWOMEY,
JED L. WASHBURN,
Attorneys for Plaintiff in Error,

J. J. LeTourneau & Co., Duluth, Minn.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 161.

ALFRED F. WEBSTER,
Plaintiff in Error,

vs.

MILO J. LUTHER and LOUIS ROUCHLEAU,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

I.

STATEMENT OF THE CASE.

This action was originally brought in the District Court, of St. Louis County, Minnesota, to determine adverse claims to Lots one (1) and two (2), in Section eighteen (18), Township sixty-two (62), north of Range fourteen (14) west, situated in said County and state. The lands are vacant and unoccupied. Plaintiff claims

to be the owner of the premises in question and the defendants deny his ownership and allege ownership in themselves.

The evidence in this case shows that on April 7th, 1887, Mary A. Robertson applied in person at the Land office in the City of Duluth, to enter the land in question as a soldier's additional homestead, under Section 2306, of the Revised Statutes of the United States. That on the same day her entry was allowed and receipt issued to her by the Register of the local land office. On April 17th, the Receiver's final receipt upon the allowance of such entry was issued to her. (See pages 10 and 11 of transcript). Under date of September 21st, 1888, patent was issued to Mrs. Robertson for the land in question, which patent was duly recorded in the office of the Register of Deeds of said St. Louis County, on the 11th day of February, 1889. (See pages 11 and 12 of transcript). October 7th, 1890, Mary A. Robertson, the grantee in the patent, conveyed the premises in question by deed of bargain and sale. (See page 12 of transcript).

The Defendants claim title through mesne conveyances claimed to be executed under the authority of an instrument called a power of attorney, purporting to have been executed by Mrs. Robertson to James A. Boggs in April, 1880, seven years prior to her application to enter the land in question, such claims being founded on a deed made by the said Boggs to the defendant Rouchleau, of an undivided one-half of said premises, dated and recorded April 15th, 1887, and a like deed of an undivided one-half to the defendant Luther, made and recorded at the same time, in each of which Boggs assumes to act as attorney in fact for Mrs. Robertson, under the said so-called power of at-

torney before mentioned. (See page 14 of transcript for power and pages 15, 16 and 17 for deeds.)

The plaintiff contended that the instrument called a power of attorney, even if executed by Mrs. Robertson, was void, and that no title could be made under it and that the same could not estop the plaintiff's grantor, Robertson, from entering the land herself for her own use and benefit, and from conveying it at will.

The trial court found that the defendants were the owners in fee simple of the lands and that the plaintiff had no right, title or interest therein, and directed judgment to be entered accordingly.

Appeal was taken by the plaintiff to the Supreme Court of the State of Minnesota, and the plaintiff appealing assigned for errors:

1. The introduction in evidence against the plaintiff's objections of the so-called power of attorney.

2. The introduction in evidence against the plaintiff's objections, of the conveyances made thereunder.

3. The finding of the court that the defendants were the owners of the premises and that the plaintiff had no right, title or interest therein, and in ordering judgment accordingly, and in not finding that the plaintiff was the owner and entitled to judgment.

4. The giving of legal effect by the court to the so-called power of attorney and in treating the same as a valid instrument and muniment of title and in applying the same to the premises in question and sustaining the conveyances made thereunder by Boggs.

5. The construction placed upon the homestead laws of the United States by the court and the ignoring by the court of the regulations and decisions of the Department of the Interior, and the construction put

upon the laws of the United States by that department.

These errors were assigned in greater detail and in greater number than here specified.

It was claimed upon the trial and in the assignment of errors and upon the appeal, that the so-called power of attorney was invalid, did not affect these premises and that it was in contravention of the laws of the United States, and against public policy fraudulent and void and that no title could be founded upon it.

In their contentions before the trial court, as well as in the State Appellate Court, a portion of the counsel employed contended that the instrument was valid as a simple power of attorney to convey after acquired property, and that it was not an assignment or transfer, or attempted assignment or transfer of the lands in question, or of any land or of the right to enter land. Other counsel contended that if it was such assignment, it was a valid instrument and that it was competent and valid to make such assignment and transfer. Such, in brief, were the contentions made by the parties in the Supreme Court of the state upon the presentation of the case there.

The trial court while committing itself to the doctrine that the right granted under Section 2306 of the Revised Statutes, was a personal one, not in the nature of property and not descendible to heirs, nevertheless treated the right as removed from any restrictions as to alienation and held the same and the land acquirable thereunder, to be transferable and determined the cause on that ground. The Supreme Court of Minnesota affirmed the decision of the District Court of St. Louis County upon the ground

that the right was a property right and transferable and that the instrument called the power of attorney was a valid assignment of the right, and judgment being entered in accordance therewith, a writ of error from this court was allowed by the late Honorable James Gilfillan, then Chief Justice of the Supreme Court of Minnesota, who wrote the opinion.

The plaintiff in error has taken the position through this entire proceeding, that he exhibited, by means of the entry of Mrs. Robertson, the patent to her and her conveyances to the plaintiff, a complete and indefeasible title to the premises, and that the claim of title of defendants in error, predicated wholly upon the said so-called power of attorney, was invalid and insufficient to divest the plaintiff of his title. The rights of the parties it is apparent turn upon the character of that instrument and the effect to be given to it, and the same involves a construction of the laws of the United States under which the lands were granted.

II.

SPECIFICATION OF ERRORS.

1. The court erred in giving effect to the instrument executed by Mary A. Robertson to James A. Boggs, called a power if attorney. (Defendants' Exhibit 1, Page 14 of Transcript).

2. The court erred in holding the right acquired under the provisions of Section 2306 of the Revised Statutes of the United States, to be assignable, and

upon the laws of the United States by that department.

These errors were assigned in greater detail and in greater number than here specified.

It was claimed upon the trial and in the assignment of errors and upon the appeal, that the so-called power of attorney was invalid, did not affect these premises and that it was in contravention of the laws of the United States, and against public policy fraudulent and void and that no title could be founded upon it.

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The trial court while committing itself to the doctrine that the right granted under Section 2306 of the Revised Statutes, was a personal one, not in the nature of property and not descendible to heirs, nevertheless treated the right as removed from any restrictions as to alienation and held the same and the land acquirable thereunder, to be transferable and determined the cause on that ground. The Supreme Court of Minnesota affirmed the decision of the District Court of St. Louis County upon the ground

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2. The court erred in holding the right acquired under the provisions of Section 2306 of the Revised Statutes of the United States, to be assignable, and

in holding that said instrument, (Defendants' Exhibit 1) was valid to effect such assignment.

3. The court erred in holding that, as between the parties, an assignment of the right conferred by Section 2306 is valid.

4. The court erred in affirming the judgment of the trial court in said action, towit, the District Court of St. Louis County, Minnesota.

5. The court erred in ordering judgment to be entered against the plaintiff in error.

6. The court erred in giving effect to the instruments of conveyance executed by said Boggs under the so-called power of attorney, through which only the defendants in error claim to have derived any title to the premises.

7. The court erred in not finding and holding that said instrument executed by Mary A. Robertson to James A. Boggs, mentioned in the first specification of error, was invalid, null and void as being in contravention of the laws of the United States, contrary to public policy and fraudulent.

8. The court erred in not reversing the judgment of the said trial court and in not ordering judgment to be entered in said cause in favor if the plaintiff in error against the defendants in error.

III.

ARGUMENT.

The whole matter involved in this case is embraced in the provisions of law relative to the granting of Soldier's Additional Homesteads, and the construction to be given thereto and the nature of the right

thus granted. A discussion therefore of the whole case, suggesting from time to time the application and sufficiency of the assignment of errors, seems to be the more simple and satisfactory method to be pursued and in avoidance of repetition.

First: The plaintiff in error exhibited a perfect title to the premises and the possessor of the legal title must prevail in this action.

The plaintiff introduced in evidence the various steps by which Mrs. Robertson became possessed of the premises and of his succession to her rights.

1. Certified copy of the application of Mary A. Robertson to enter this land in 1887.

2. Record of the Receiver's receipt upon such application, dated April 7th, 1887, recorded in Book 20 of Deeds, page 71 of the records of St. Louis County.

3. Record of patent, the United States to Mary A. Robertson, dated September 21st, 1888, recorded in Book "D" of Patents on page 37 on Feby 11th, 1889.

4. Deed of bargain and sale, Mary A. Robertson to Alfred F. Webster, the plaintiff in error, executed on the 17th day of October, 1890, recorded in Book 30 of Deeds, page 621, on the 22nd day of October, 1890.

This made a complete title in the plaintiff and with the facts admitted in the pleadings, entitled him to recover, unless the defendant by the evidence adduced changed the situation.

The evidence adduced on the part of the defendants consisted of the so-called power of attorney (Defendants' Exhibit 1), which purports to have been executed by Mary A. Roberfson to James A. Boggs April 28th, 1889, and the deeds executed thereunder to the defendants, all of which were received subject to the objections of the plaintiff, which instruments and the

objections thereto, as made, are found, commencing at the bottom of page 13 of the transcript and ending on page 18 thereof.

The entire claims of the defendants are predicated upon the instrument called the power of attorney, defendants' exhibit 1. (See page 14 of Transcript).

As before suggested, this case was submitted to the trial court by the defendants in error, mainly upon the theory that the instrument in question was a valid power of attorney to sell after acquired lands, although counsel for defendant in error Rouchleau, claiming an undivided one-quarter interest in the premises, did discuss and argue for the assignable character of what is called a soldier's additional homestead right, for the purpose of upholding the validity of the instrument in case it should be held to be an assignment rather than a power of attorney, and what is true of the manner of submitting the said cause to the trial court is also true of the manner of the submission of the same to the Appellate Court, the Supreme Court of the State of Minnesota. In so far as counsel for defendant in error argued that this instrument is a valid power of attorney they arrived at their conclusion largely by taking from the instrument only those portions thereof containing language apropos to letters of attorney, adopting that and disregarding the remainder. Upon the validity of this instrument as shown upon its face and as shown by reference to the other evidence in the case, the entire rights of the defendants are predicated.

We have never deemed it necessary to cite authority to any court before whom this case has been pending, to sustain the proposition that this instrument will be

construed as an entirety and in its entirety. We scarcely think that the court will sever the instrument for the purpose of extracting therefrom a valid contract, but that it will be read and construed all together.

A power of attorney is a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes. The very embodiment of its character is that it is an instrument by which one person is authorized to act in the place and stead of another, for his benefit. The instrument in question is lacking in every essential element of a power of attorney.

It appears to have been executed in 1880, before any of the land to which by any possible construction it could refer, or to which it could be claimed it was ever intended to refer, were entered or any steps taken to obtain the same from the government, and seven years before Mrs. Robertson was permitted, upon her own application, to enter the land involved in this action.

It undertakes to authorize Mr. Boggs to sell, upon such terms as to him shall seem meet, any lands that she had then obtained or might thereafter acquire as an additional homestead, receive the purchase money upon such sale, to execute deeds, to prosecute and defend at his own cost any action respecting the land, or for the breach of any contract in relation thereto, or for any trespass thereon or injury thereto; to receive the consideration for the sale of the lands for his own use and benefit, and expressly released all claim to any of the proceeds of any such sale, lease, contract or damages. In other words, it undertook to give him dominion over such land, with full right and power to sell it and keep the proceeds, and

the donor also released all rights of dower and homestead exemption, etc., in the premises.

It would seem to need no argument to show that the instrument, all read and construed together, had no other purpose or intendment than to put it in the power of Boggs to have and enjoy the benefits of the additional homestead that Mrs. Robertson might obtain, or which she had then or might thereafter obtain, and thereby effect a sale and transfer of what is called a Soldier's Additional Homestead right, or of the lands to which the donor therein was entitled, prior to any act or thing done to acquire them.

Whatever act Mr. Boggs does thereunder, he does not for the benefit of the donor, but for himself. Nothing was to accrue to her; no further act was to be done that would benefit her and whatever it was, if anything that induced the execution of the contract, she was never to receive anything further, if this instrument is valid; and thereafter the fruits and benefits of the gift of the government were to go to Boggs. It states no consideration other than the seal imports; it either evidenced a gift or a sale, for the purposes of this discussion, it matters little which. The instrument, we insist, is utterly null and void, as being in contravention of the homestead laws of the United States and against public policy.

It was not claimed or contended in the submission of the case on the part of the defendant Luther, claiming a three-fourths interest in the premises, that the instrument, if an assignment, was a valid one, but it was argued that it was not such an assignment, but a good and sufficient authority to sell the lands theretofore or thereafter acquired by Mrs. Robertson by

virtue of her homestead rights, but the plaintiff in error ventures the assertion that there exists no court, which by any consistent reasoning can hold such an instrument to be anything else than an assignment. The trial court so construed it and so did the Supreme Court of the State of Minnesota, and as we shall see it has received that construction from all of the authorities upon which the defendants in error will rely, emanating from the two or three courts which have passed upon these questions, which authorities we shall advert to later in.

In this connection, the court is referred to the following cases:

Allen v. Merrill, 8 L. D. 207, 223.
Allen v. Merrill, 12 L. D. 138.
Cook v. Lindsay, 57 Tex. 57.
Brown v. Simpson's Heirs, 67 Tex. 225.

The atention of the court is particularly directed to the language used by Secretary Vilas in the case of Allen v. Merrill above cited.

Reliance has been placed by counsel upon certain decisions of the Supreme Courts of Minnesota and Wisconsin, as supporting the sufficiency of certain powers of attorney to authorize the conveyance of after acquired property.

We do not dispute but that a person may give a valid power of attorney to convey in his name and for his benefit property to be thereafter acquired, whether the same is to be obtained by compliance with any of the homestead laws of the United States, or in any other manner, after the same has been acquired. Such an instrument would not be a conveyance and would not authorize an invalid conveyance, and we

contend that Knight v. Leary, 54 Wisc. 459, determines no more.

It was contended that the case of Gilbert v. Thompson, 14 Minn. 414, had some application to support the defendants' views as to this instrument being a valid power of attorney as such, but in each of these cases, the instrument involved contained nothing upon its face that was inconsistent with a simple power to sell and convey for the benefit of the constituent, and the Minnesota court refused to admit oral proof as tending to vary the instrument and intimated very strongly that if the instrument was in fact executed for the purpose of transferring the benefits of the right to another and the same appeared upon the face of the instrument, that the result would be otherwise.

We urge that the whole purpose of this class of instruments was to accomplish by circumvention what was not permitted or valid to do directly, and upon its face and of itself and by its very existence, argues against its validity. If it were valid to make an assignment of these rights, it would be a simple thing to do so and it needed no such circuitous method.

Under this instrument, executed some seven years prior to the entry, Mr. Boggs claims the right to step in, put out his hand and take the property from the beneficiary so soon as it is entered, convey it to another and appropriate the proceeds to his own use. To give him the right to sell and retain the proceeds is no different in effect than to transfer to him the lands. If the instrument is valid, he can himself become essentially the beneficiary; if it is not, neither he nor any other person can acquire any right to the property under it. There can be no innocent purchas-

ers under this instrument. By every elementary principle of the laws of agency and conveyancing, it is invalid as a power of attorney; it is notice to all claiming under it of its own infirmities and it forms no impediment to any person purchasing from Mrs. Robertson after she has entered the land, received the patent and acquired thereby a good title, and works no estoppel upon her to sell and convey the same.

Second: The instrument being an assignment or attempted assignment of the right to have an additional homestead, an attempted transfer of the land so to be derived, before any act or thing is done to obtain it, is utterly null and void, being in contravention of the laws of the United States relative to the disposition of public lands and granting the Soldier's Additional Homestead rights, and against public policy and fraudulent.

A brief examination of the several sections of the Revised Statutes constituting the Homestead Laws, will, we believe, disclose the truth of this proposition. The laws providing for the acquisition of a homestead upon government lands are to be found in the Revised Statutes of the United States Sections 2289 to 2312, the purpose of which is clearly to give to every person within its comprehension an opportunity to acquire a home free, in good faith, by residing upon it and improving it.

To obtain a homestead the party must, in connection with his application, make affidavit of his qualifications, and that the entry is made for his own exclusive use and benefit, and for actual settlement and cultivation. Upon compliance with these conditions and the payment of the required fee, a receipt is given

and an inceptive right is thus vested in the settler.

By such proceeding and upon the faithful observance of the law for a stated period in regard to settlement and cultivation,and upon acceptable proof thereof and payment of the further fee required, a receipt and certificate is issued, which forms the basis for a patent, which, when issued, gives a complete title.

A concise statement if the procedure and law, with citations of the forms and proofs and other Acts of Congress, may be seen in Copp's Land Laws, Vol. 1, page 254, et seq.

The whole homestead law has running through it the one idea of giving, upon certain conditions and compliance therewith, one opportunity to each of the class of persons within its provisions to secure a home to himself and family, free. The qualifications and requirements are personal. The whole intent of the administration of the law has been to confine the disposition of the public domain under this act, within these personal restrictions, and only in case of a fraud practiced upon a generous government have lands been thus acqired by any except actual settiers, and these restrictions continue until the settler has done all that is required of him to entitle him to a conveyance by patent of the legal title; that is, until he has procured his final receipt, and not until patent issues does the jurisdiction of the government cease. No estate in lands vests in the homesteader until he has complied with the requirements and conditions, including final proofs.

Thrift vs. Delaney 69 Cal., 188.
Colman vs. McCormack, 37 Minn., 179.
Webster vs. Bowman, 25 Fed., 889.
And authorities hereinafter cited.

Prior to compliance with the conditions and making

proof thereof, there can neither be alienation of the land nor can the same be encumbered or taken for debt, but after the proofs have been made there is no restraint upon alienation, except that the purchaser would take the risk of cancellation, suspension or other supervisory act of the government until the patent should issue when the title thus secured would relate back to the entry.

Anderson vs. Carkins, 10 Sup. Ct. Rep., 905.
Union Mill Co. vs. Danberg, 2 Saw., 450.
United States vs. Ball, 31 Fed. Rep., 667.
Newkirk vs. Marshall, 10 Pac. Rep., 571.
Webster vs. Bowman, 25 Fed. Rep., 889.
Cheney vs. White, 5 Neb., 261.
Jones vs. Yokman, 5 Neb., 265.
Baldwin vs. Boyd, 25 N. W. R., 580.
Mellison vs. Allen, 2 Pac. Rep., 97.
Oakes vs. Heaton, 44 Ia., 116.
Dawson vs. Merrille, 2 Neb., 119.

In the matter of the alienation before rights are perfected, a homesteader and pre-emptor have been put upon substantially the same basis, and any agreement to convey the land made before final proof is in violation of law and void, and cannot be enforced either in law or equity.

Skorman vs. Eakin, 1 S. W. R., 559, (Ark.)
Cox vs. Donnelly, 34 Ark., 762.
Thompson vs. Doaksum, 10 Pac., 199.
Sutherland vs. Whittington, 46 Ark., 285.

The law of 1872, 17 Statutes at Large, pages 333 and 334, codified in the Revised Statutes of the United States, Sections 2304 to 2309, embraced provisions peculiarly and specially for the benefit of soldiers and sailors. The law was enacted as a part of the homestead laws, and by its enacting clause, as well as by the language of some of its sections, it is engrafted upon and into that law and became a part of it.

Section 2304 provides that every private soldier or

officer who has served during the rebellion for ninety days and been honorably discharged, shall, upon compliance with this chapter (Chap. 5, Revised Statutes), as hereafter modified, be entitled to and receive patents for a quantity of the public lands not exceeding 160 acres, etc., and provides for his residence, improvement, etc.

Section 2305 allowed the period of military service to be deducted from the time required to perfect title.

Section 2306 provided that any of the persons coming within the provisions of Section 2304, who had previously entered under the homestead laws, a quantity of land less than 160 acres, should be permitted to enter enough more to make 160 acres in all, the evident purpose of the law as well as of every effort of the government being to equalize the quantity of land that this class of persons might take, to make the homestead gift on the part of the government as nearly equal as possible.

Nothing is plainer than that the law was not a law alone providing a new and independent method for the acquisition of public lands, nor a complete nor independent law of itself, but it was a modification of the homestead law respecting the requirements for cultivation, etc., and was engrafted upon said law, and the provision for an additional homestead is only one of its provisions, adding a further right to a particular class of persons, the effect of which law when added to the then existing homestead law, being to give to each sildier and sailor, or his widow and minor children, the benefit of 160 acres of land under the homestead

laws, and to shorten the period of cultivation by his term of service or of enlistment in certain cases.

An attempt is made on the part of the defendants in error to separate out Section 2306 and claim for it exemption from all restrictions of the remaining sections of this or the original homestead laws.

This has been the attempt of all of those persons who have endeavored to find some new, quick and cheap way to become possessed of valuable public lands, but all such attempts have heretofore been, so far as possible, thwarted by the Department of the Interior, as an examination of the uniform decisions of that Department will show. In order to maintain any such view, this provision must be entirely separated from the homestead law, and not only that, but it has soldier and sailor, or his widow and minor children, to be separated out from the very provisions of the bill of which it is a part.

If the original homestead is a personal right, so is the additional one; if the original homestead is not subject to barter and sale before the premises are acquired, neither is the additional one, and the fact that the provisions relative to the original homestead as to residence, etc., are relaxed as to the additional homestead, does not in any manner change the character of the grant. No valid reason can be offered why all of the personal restrictions and qualifications surrounding the original homestead laws do not apply to this.

Third: The Department of the Interior is the executive department of the government to which is given jurisdiction of the dispositon of the public lands, and by positive enactment in the law of 1872, Section

6, this department is charged wth the duty of carrying it out, and upon it devolves the duty of establishing a procedure in harmony with the spirit of the law to give the same force and effect and to render the same available to those within its comprehension, and such procedure becomes eventually a part of the land laws.

Sections 449 and 453, R. S. of U. S.

See Vantongeren v. Heffernan, 38, N. W. Rep., 52, which is an exhaustive and instructive case on the jurisdiction of the Land Department decided by Chief Justice Tripp and note the language on page 55.

See also Poppe vs. Athearn, 42 Cal. 607.

The contemporaneous and uniform construction of a law by executive officers charged with its execution is entitled to great weight, and while courts are not to be bound by such a construction, nor by any precedent for that matter, they have generally given thereto the full force of judicial determination and judicial precedent as evidenced by many important cases, and the construction placed upon such a law by such officers will not be overruled without cogent reasons.

The uniform construction for these twenty years placed upon these laws by those charged with their execution is sanctioned by the court, and has a ruling and controlling force in the trial of the cases involving the same.

Hastings & Dakota R. R. Co. v. Whitney, 34 Minn., 538; S. C. on appeal, 132 U. S., 357; L. Ed., 363.

United States v. Hill, 120 U. S., 169, 183; L. Ed., 627, particularly last page of decision.

United States v. Philbrick, 120 U. S., 52, 57; L. Ed., 559.

Brown v. United States, 113 U. S., 568, 574; L. Ed., 1079.

Edwards v. Darby, 12 Wheat., 206.

United States v. Moore, 95 U. S. 760-763.
United States v. R. & M. R. R. Co., 98 U. S., 334; L. Ed., 198.
State v. Batchelder, 5 Minn., 178.

An examination therefore of the construction placed upon these laws, and particularly those with reference to additional homesteads by the Land Department of the United States, is instructive and is entitled to the weight of judicial decision in the examination of this case.

The first circular with reference to additional homesteads was issued by the Commissioner of the General Land Office, of date June 13th, 1872. This circular in prescribing forms of proofs required the applicant to swear that the entry was made for his own use and benefit, and for the use and benefit of no other person or persons whatsoever. This necessarily involved a construction of the law that the rights granted there under were of an unassignable character.

August 5th, 1874, a circular was issued allowing the required affidavit to be made before the clerk of any court of record for the county where the applicant resided and forwarded to the land office. The "required affidavit" was one wherein he had to swear the land was taken for his own exclusive use and benefit. This circular had express departmental sanction, being signed also by the acting Secretary of the Interior. Under this circular the entry could be made by attorney, but it could only be made for the exclusive use and benefit of the soldier, and this negatived all idea of a sale or transfer of the right before entry. The only object of the circular was to relieve the applicant from the requirements of personal attendance at the land office of the district where the land was situated.

No change was made in these instructions until

1876, when on May 17th, 1876, Secretary Chandler addressed the Commissioner of the General Land Office upon the consideration of a report by the Commissioner reviewing the fact that frauds had grown up in the location of these additional homesteads, and that by means of two powers of attorneys, one to locate and one to sell (the latter kept away from the sight of the department), transfers and sales of these rights were effected.

The secretary reviews the issuance of the circular of August 5th, 1874, stating that its only purpose was to relieve the soldier from the hardship incident to a personal attendance at the land office, and regretting that the abuse of the privilege granted by his former order, made it necessary to revoke that order.

The secretary in this order refers to several sections of the statute for authority for this action, declaring that Section 2294 authorizing proofs before clerks of court, and of Section 2309, authorizing location by attorney, both referred to the taking of original homesteads which were to be followed by actual occupation and improvement, and upon an examination of the statute his correctness in that regard will be manifest.

He further expressly declared: "The right to make the entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge or other disposition of his right to make the entry, or the land which he applies to enter.

On May 22nd, the Secretary of the Interior and the Commissioner of the Land Office issued a circular of instruction under the title, "Frauds in Soldiers' Additional Homesteads," for the guidance of Registers and

Receivers, embracing the provisions and substantially the language of the order of the 17th. See Copp's L. L., Vol. 1, pages 486-488.

July 10th, 1876, Secretary Chandler made a slight modification of this order, in the interest of those who under it, acting by attorney, had selected additional homesteads far away from their place of residence, in so far as he excepted from its operation entries pending at its date, but directing that the entries should be closely scrutinized.

Copp's L. L., Vol. 1, page 480.

On February 17th, 1877, Commissioner Williamson made a report to the secretary, reciting the previous orders made and reviewing the irregularities and abuses that had grown up under this law, and after disposing of the case before him and maintaining the consistency of the various orders of the department and the absolute want of merit in the claim before him goes on to show that he has been urged by parties representing various classes of additional homestead claims, to submit some recommendation respecting the acquisition of lands thereunder in harmony with the intent of the statute. He suggested that the rules and regulations requiring personal attendance at the land office were a hardship on the soldier, and that many would thereby be deprived of the benefit of the right and he thought that requirement ought to be waived, and expressed a view that inasmuch as the doctrine of American law tended to discourage restrictions upon alienation of property, that the same ought to relieve the homestead rights from restriction against their alienation and referred to the fact

that Section 2306, in and of itself, contained no prohibition against alienation.

See Copp's L. L., Vol. 1, pages 408-485.

On March 10th, 1877, the secretary upon this report made an order modifying the circular instructions of the 22nd of May, 1876, so as to allow entries to be made by an agent or attorney of the party originally entitled to enter, but only after the claim had been presented to the general land office and certified as valid, but without in any manner relaxing his decision that these rights were personal and unassignable, and on May 17th, 1877, a circular of instructions formulated upon this decision was promulgated, providing the course of practice to be pursued.

The whole purpose of the procedure outlined was not to render it possible for the soldier to sell his additional homestead rights. The suggestion of the Commissioner in that regard was entirely overruled, but the order was promulgated with a view to prevent such frauds by circumlocution and simply to enable the soldier to obtain the lands for himself without being compelled to go to the place of its location.

By the circular issued September 1st, 1879, the homestead applicant was required to swear under this procedure, that he had not sold his additional homestead claim.

See Copp's L. L., Vol. 1, page 485.

See also same volume, pages 262 to 265 and 282 to 303.

These two latter citations being under the code of procedure outlined in the general circular of October 1st, 1880, wherein the same precautions were taken

to prevent any traffic or trading in Soldiers' Additional Homestead rights.

See also forms 4-015 and 4-065.

The whole theory seems to be to tack this additional homestead on to the former one. It has no independent existence, and final proofs cannot be made of it until proofs have been completed and all of the requirements complied with as to the original homestead, the entry of the additional, if such proofs have not yet been consummated, being held with it to abide the consummation thereof, and should the lands be in the same land district, the final receipt and patent will issue for both tracts together; but where in different districts the rule has to be departed from. Vol. 1, C. L. L., page 264.

The only thing that is relaxed for such cases is residence upon the additional tract, for by the sufficient occupation and improvement of the former homestead it and the additional tract are earned together.

The next and last circular of instructions upon these matters was issued February 13th, 1883, whereby the practice of permitting entry to be made by agent or attorney was discontinued because of the frauds that had grown up, and the soldier was required to make his application as in cases of original entry, together with proofs of his identity, etc., all right to act by attorney in the entry had been suspended.

This circular also declared the right to be a personal one, not transferrable or subject to assignment, and that it could only be exercised by the soldier in his own proper person.

Thus it is seen that in official instructions and in the administration of these laws, the department has

universally adhered to the personal character and non-assignabilty of these rights.

The constructon placed upon these laws by the department is further and unequivocally set forth in sundry important decisions.

In re., William French, 2 L. D., 235-7, (10 L.L. O., 211).

In re., Rulands Children, 2 L. D., 241, (11 C. L. O., 38).

In re., Lars Windquist, 4 L. D., 323.

Smith Hatfield, et. al., 6 L. D. 287.

J. B. Haggin, 7 L. D. 287.

Hoffman v. Barnes, 8 L. D., 608.

J. W. Jones, 9 L. D., 195.

John M. Walker, et als., 7 L. D., 565, decision by Secretary Vilas.

John M. Walker, et. als., in review decision by Secretary Noble, 17, C. L. O., 14.

Selden v. Matthews, 14 L. D., 205.

Force was laid by the trial court and by some of the other courts in certain decisions which we shall refer to later on, upon the fact that at the time of the amendment dropping out the provision requiring the land to be contiguous to the land previously entered, that the phrase "under the provisions of this act" was also dropped out, it being argued that the same evinced an intention that the land should be relieved from all restrictions as to alienation.

With all due respect to the high sources from which such suggestions come, it does indeed seem to be difficult to discover why that in any manner changed the character of the right granted. The entry and right of entry depended and was made to depend as before upon the soldier's right to enter under the homestead laws. The section had then become a part of the homestead laws. By the enacting clause of the law of 1872 it became engrafted upon and into the homestead

law of 1862; to have retained the words "under the provisions of this act" would have been useless; it seems to us to have the contrary effect, if any at all, to that suggested, for the section had then become a part of the whole homestead law and the limiting words "under the provisions of this act" were omitted. Congress seems to have so recognized it, for it changed the word "section" to "sections," making it read: "Any person entitled under the provisions of the foregoing sections" etc. There was but one foregoing section to the act of 1872 itself. Thus every expression in the section was omitted which could by any possible construction sever the relation of this section from the then existing law of 1862, as modified by the law of 1872. No other law has been pointed out providing for the entry if these lands, or any other method of obtaining them, and the references hereinbefore made to the acts and decisions of the department, clearly indicate the manner in which the executive department of the government then viewed this law and the force and application to be given to it.

The enforcement of the law was left to the department. No procedure for making an additional entry was provided, and the department, construing it as we have seen, have construed it as a part of the original homestead laws, subject only to the modifications therein made, and it would seem clear that Section 2291 was as applicable to the grant made by Section 2306 as any other, only so far as actually and necessarily modified.

The officers of the government in construing this law have experienced no difficulty; they have relaxed the requirements of residence and cultivation only where it has been complied with as to the other tract,

and in cases where this requirement has not been fulfilled as to the other tract, as we have seen before, the additional homestead is held in abeyance and both proved up together. It has only been with those who have attempted to circumvent the law and gather up large and valuable bodies of land under these so-called powers of attorney, that any difficulty has been experienced. This method adopted to obtain the lands by speculators and appropriate the benefit of the law clearly indicates that in fact their view of the law was in accord with that of the government.

The officers of the land department are a tribunal established by law, and their decisions are received by the courts of the country for whatever effect should be given to them, the same as the reported decisions of any other tribunal.

If the Department of the Interior, then, charged with the duty of establishing this procedure is correct in its interpretation and construction of the law, in which we think it will be sustained by this court, then by the requirements established by the department, as well as by the law itself, the party after the execution of this instrument, would have to commit perjury before he could obtain the land, and for this reason the transaction would be against public policy and void.

If these rights are personal, not assignable and transferrable as property, not descendable to heirs and of the same character as the right conferred under the original homestead law, and the land that may be acquired thereunder not subject to alienation before its acquisition, then the court clearly erred in holding the right to be assignable and in holding it competent

to make a contract by which the land becomes alienated before its entry and clearly erred in sustaining the instrument by which the assignment and transfer of the right was attempted to be wrought and by which it is claimed the beneficiary of that right in this case was estopped to enjoy the fruits of her entry of the land, and the court erred in finding the defendants in error to be the owners of the premises and in not finding the plaintiff in error to be the owner thereof, and ordering judgment accordingly.

Fourth: The right granted under these laws is a personal one, cannot be assigned or transferred to another, nor the subject of traffic, and prior to entry and final proofs the full requirements of the law complied with, there can be no alienation and all attempts to transfer the same or render the same effectual for another's benefit are void and no right can be acquired thereby.

Such we have seen to be the ruling and construction of the Land Department of the United States, and in further support of the proposition we refer the court to the following cases:

Nicholas vs. Council, 9 S. W. R., 305.
Mackintosh vs. Renton, 3 Pac. Rep., 830.
Mackintosh vs. Renton, 19 Pac. Rep., 144.
Anderson vs. Carkins, 135 U. S. 483; L. Ed., 272.
Marshall vs. Cowles, 3 S. W. R., 188.
Skorman vs. Eakin, 1 S. W. R., 560.
Warren vs. Van Brunt, 19 Wal., 641.
Cox vs. Donnelly, 34 Ark., 762.
Weeks vs. White, 21 Pac. Rep., 100.
R'y Co. vs. Kennedy, 20 Pac., 696.
Huston vs. Walker, 47 Cal., 484.
Damrell vs. Myer, 40 Cal., 166.
Bass vs. Buker, 12 Pac., 922.
Brewster vs. Madden, 15 Kan., 195.

Cases might be multiplied in support of the non-

alienable character of the homestead and pre-emption rights and of the lands previous to their acquisition thereunder, both of which in this regard as we have seen have been put upon the same footing, although in one there is a positive express prohibition and in the other not.

At the time this action was first instituted the only cases we believe that could be said to announce any contrary doctrine, were the cases of Mullen vs. Wine, 26 Fed. Rep. 206 and Rose vs. Wood & Lumber Co. 73 Cal., 385, and these cases have been the foundation of those which have followed.

Since that time the following cases have been decided:

Barnes vs. Porier, 64 Fed., 14.
Montague vs. McCarroll, 36 Pac. Rep., 50.
Stewart vs. Sutherland, 93 Cal., 275.
Grant vs. Oliver, 91 Cal., 158.
Montgomery vs. Land Bureau, 94 Cal., 284.
Webster vs. Luther, 50 Minn., 77, the case now under consideration.

These cases except one are all either Minnesota or California cases.

The case of Mullen vs. Wine decided by his Honor Mr. Justice Brewer while upon the circuit bench, was the first of this series of cases. The decision was a brief one and the court indicated that the consideration he should give to the matters involved would be brief as he was assured the case would go to the Supreme Court for final decision. The opinion states that after the lands had been acquired in the name of the minors, that the defendant acquired a deed from them. We have not the advantage of access to the record, but that fact alone would seem to have been sufficient to set all other questions at rest.

The views expressed briefly by the court were that

the right to enter the land was personal property and as such assignable.

If the right is subject to barter and sale, it must be personal property, but so far as we believe none of the counsel have been willing to risk that contention. If it is a gift conditionally bestowed upon a class of persons for their own use and benefit, it is not clear how it can be regarded as property. The land when acquired is assuredly property, but the difficulties of holding the right to be property and subject to barter and sale as a chattel, multiply upon consideration.

Hon. O. P. Stearns, whose memorandum in another case was adopted by the judge in this case, which memorandum may be seen on pages 21 to 23 of the transcript, was unable to subscribe to this view, and he could arrive at no other conclusion than that the right was a purely personal one, would not descend to heirs, could not be levied upon for debt and was unassignable. It seems irresistable that if the right is personal property, it could be levied upon and sold under execution, and would be a proper subject of inheritance. It is so clearly apparent that it possesses neither of these attributes, that we think the court would not approve a continued discussion upon that phase of the question.

The Supreme Court of Minnesota avoided a discussion of this dangerous topic in the decison rendered in this case.

Rose vs. Wood & Lumber Co. 73 Cal., 385, contains no exhaustive discussion of the matters involved and rests upon the conclusion of the court that Section 2291 had no application to Section 2306 and that the rights granted under Section 2306 were therefore independent and different in character from those con-

tained in the other provisions of the homestead law.

The decision in Grant vs. Oliver, 91 Cal., 158 is by the same judge. The land in question was entered under the homestead laws as an additional homestead; the entry was allowed and the land patented and conveyed under a power of attorney. The defendant filed a cross bill claiming the lands under the pre-emption laws and alleging settlement prior to the time of the homestead entry. It was claimed that the lands were within the limits of an old Mexican grant and therefore not subject to entry under the homestead laws and that the land should not have been patented to the homesteader. The action was for the possession of the premises. The court held that the Land Department had passed upon the matter and declined to go into the merits of the controversy, (see page 161 of decision), and held that even if the allegations as to the conduct of the Land Department were true, the relief could not be had in that form of action. There is only the barest reference to the case of Rose vs. Wood & Lumber Co. on page 162, and it cannot be said that this case can have any influence upon this court.

Thequestions now under consideration were neither properly involved nor was their determination essential to the decision.

The case of Stewart vs. Sutherland, 93 Cal., 270, was also between claimants under the homestead law, after the land had been patented thereunder, and one who desired to pre-empt the land, the former being plaintiff's and the latter alleging that the patents were issued in violation of the provisions of Section 2306, and hence void. The defendant claimed that certain

powers of attorney involved, showed an assignment of the homesteader's rights to one Hyde, donee therein, before the patent issued and that the officers of the Land Department had no right to issue the patent. The court said on page 275: "It is unnecessary to consider the question whether such a right can be assigned before proper entry of the land is made, but we entertain no doubt that after entry has been made and patent issued the soldier may sell his land and pass a good title thereto * * * * *

Here there is nothing to show that the assignments or sales were not made after the entry of the premises in the local Land Office and as the rights of the parties, as appear from the answer, were contested before the Commissioner of the General Land Office and Secretary of the Interior, we must assume that the entries were authorized and proper and the sales valid."

It would appear, therefore, that this case is not forceful on the questions under consideration.

The case of Montgomery vs. Pacific Land Bureau, 94 Cal., 284, following Rose vs. Wood & Lumber Co. held the law not to have been violated by the execution of the power of attorney and the entry and conveyance of the land thereunder, thus in effect holding to the doctrine of the assignable character of the right, and that the right being assignable, it did not violate the spirit of the law to enter land in the name of the soldier and claim it and the right to convey it under the powers executed before entry.

Let it be noted in that case it was admitted that the legal title was in the plaintiff and the entry was made under the power.

The case of Montague vs. McCarroll decided by the

Supreme Court of Utah, 36 Pac., 50 and the case of Porier vs. Barnes, first decided by the Circuit Court of the District of Minnesota and afterwards by the Circuit Court of Appeals, and finally reported in 64 Fed., page 14, are the only cases, aside from the decision in the case at bar, wherein these questions have received any extended consideration. In all of these cases the decisions have been rendered in support of the claim of title under the so-called powers of attorney, upon the grounds that the right to have the homestead was assignable and that the power of attorney so called, was a sufficient instrument to effect the assignment thereof, which is the feature of the case least relied upon and deemed most dangerous by the counsel for the defendants in error upon the previous presentations thereof, and upon which defendant in error Luther in the submission of this cause to the Supreme Court of Minnesota did not rely at all.

All that is said in the Montague case is covered by the Barnes case, and so far as the cases relied upon by the defendants in error are concerned, a consideration by this court of the latter case will not omit any of the contentions of the defendants in error. The opinion proceeds upon the theory that the provisions of the act of congress of 1872, granting these rights to the soldiers, vested a property right in them free from any restriction as to alienation, and that the grant was of a different character than any bestowed by any of the other provisions if the homestead law. In the latter part of the case, the court seems to realize that a proper construction of the law has been strained to reach the conclusion, but in view of the fact that many persons have attempted to obtain the public lands in the method pursued here, the court

was influenced not to make a decision that would disturb such claims of title.

That the laws which presumably were enacted for the benefit of the soldier should have been made an engine by which to set in motion the machinery of a procedure to capture for a song the valuable timber and mineral lands of the Western States, it seems to us is not a persuasive argument why the same should be upheld, if contrary to the spirit, intent and plain purpose of the law.

Since matters not in evidence were referred to in the opinion, it might not be out of place to note that it is a matter of common knowledge that by the ingenious device of these powers of attorney, sometimes by onepower, sometimes by two, the one being kept secret from the department, large quantities of valuable timber and mineral lands have been gathered up, or attempted to be gathered up, by speculators, and it is not in the agricultural regions that these questions generally arise. What was originally intended and what might, under the construction placed thereon by the department, become a valuable grant to the soldier, has been by circumvention and by ingenious device, converted into a means of speculation, with little or no beneficial result to the soldier.

All of these decisions at all in support of such an instrument as here involved and upon which rests the sole claim of title on the part of the defendants in error, proceed upon the theory, not that they are powers of attorney to act for the benefit of and in the name of another, but that they are a sufficient instrument to accomplish an assignment of the right of entry of the donor, and an adequate method by which the right, and the land to be acquired thereunder may

be transferred before any act or thing done to obtain it.

If such right is assignable why should not the assignee enter the land in his own name, as under the old military land warrants? Why pretend to act for another in order that he may obtain for himself? When was ever an assignee of such right permitted as such to enter the public lands in his own name?

If congress intended that the grant should be assignable, it indeed took a queer way to express it and we beg to urge to this court that if by fraudulent practices, if by practices in contravention of the spirit of this law, the purposes of the law have been defeated, or attempted to be defeated, that a multiplicity of such acts should not work a justification thereof.

Notwithstanding these decisions, we respectfully urge to the court that the reasons advanced in support of titles made by conveyance under these so-called powers of attorney, are not convincing and the same do violence to the provisions of law, are contrary to the construction thereof by the executive department of the government, are unsupported by any principle of statutory construction, and no argument yet made has been sufficiently ingenious to hide its inconsistencies.

We agree with counsel for defendants in error, that the supposed advantage to flow to the government from the enactment and operation of the homestead laws was not in the amount of land that should be patented. The government has never manifested any desire to facilitate the speedy acquisition of the legal title to the homestead, nor legislated with the view of aiding traffic in homestead rights. When the government desired to make a disposition of any of

its lands by sale, or render the same subject to barter and sale, it has found no difficulty in enacting measures therefor. It never enacted the homestead laws for any such purpose.

One of the objects certainly was to build up a nation of freeholders, a self-sustaining and producing people, who would acquire the land for the purpose of retaining it for their own benefit.

Not only in the provisions of Section 2291, containing the substance of an affidavit of non-alienation, but throughout the entire laws, including the laws of 1872 modifying the former acts, it is unmistakably apparent that the government was not, in these measures, struggling unnecessarily to bestow a right which might at once be made the subject of traffic. It was, as has been said, a gratuity, but only to certain classes, with certain personal qualifications, upon certain conditions, all of which were of a personal and individual character.

By the law of 1872 certain important modifications were made, but in none thereof is there the slightest evidence of any intention to relax any of these personal requirements, or to change the character of the grant.

By the very enacting clauses, as well as by the language of its sections, it depended upon and became a part of the then existing homestead laws. This cannot be gainsaid, even though it may be said that the arrangement in the codification of the laws will not be decisive.

The class entitled to acquire homesteads was enlarged, the quantity of land which might be taken increased, the required period of cultivation allowed to

be shortened by the period of military service, or, in some cases, the term of enlistment.

As some coming within this class had already taken homesteads, which, under existing laws, were of less area than they might now acquire under the law as modified by this act, to equalize the gift, congress authorized in the next section such persons to enter enough more land "under the provisions of this act" to make the amount up to 160 acres.

None of the counsel go so far as to claim that if a soldier had not yet taken a homestead he could transfer that homestead right, but he must comply with all of the personal requirements to obtain it that any original homesteader would, save the modification as to the required period of cultivation.

If he had, just prior to the passage of this act, located a homestead upon which he must yet work out all the requirements before the government would give it to him, we think that counsel do not claim that any additional land could be acquired under Section 2306, save by fulfilling the requirements as to his first homestead, upon which tract he was allowed to perform that portion of the conditions relating to residence and cultivation, forming part of the conditions upon which the government would bestow upon him the additional tract.

He might locate it, he might cultivate it or enjoy the rents and profits thereof, but the title must stand in abeyance and abide the performance of the other conditions on the other tract, which, complied with, both could be proved up together, and, if in the same district, would be included in the same patent. If the original homestead had been proved up, then that part of the conditions as to residence and cultivation

upon that tract being treated as a satisfaction of that requirement as to all, because the homesteader could not live upon two tracts at the same time; he could proceed with the other proofs and obtain the land.

There is apparent no intention to relax the other requirements and to do so would render the gifts more unequal and unlike than before and the attempt was to equalize.

The government received no money consideration for the land; the only charges were for officers' fees. The homesteader derived all the benefits of his cultivation. He has purchased nothing from the government; there is nothing he can sell until after he has acquired the land by doing all that is required of him to make the gift complete. The same intention is apparent in all of these statutes.

The government did not do anything to make a gift of a right requiring nothing from the donee to make the gift valuable, and which could be speculated in and of which this class of citizens could be divested for a farthing; it was not attempted to grant something which could be most readily sold, but it was attempted to enlarge upon the previous homestead grants, without changing the character thereof. The attempt was to equalize. The acts should all be harmonized and construed together; that is just what the department did do.

Sutherland on Statutory Construction, Section 283 and authorities there cited.

If the government intended to give the soldier something to sell at once, it could have no relation to the homestead laws and it would be folly to connect the same in any manner therewith by enactment, and hazard and hamper the free dealing therewith, and it

would be still greater folly to undertake to secure to him, in a personal way, the acquisition of the land, to the end that he should have the full benefit of the land and its value and protect him from the intrigues of speculators to prevent the taking of that right from him for an inadequate consideration, and yet engraft upon the grant such provisions as would enable anyone to defeat that object without an infraction of the law.

The construction sought to be placed upon the law by the defendants in error would make the grant less valuable to him than it would have been either by free sale of the right, as by land warrant, or the acquisition of the land itself. The government certainly did not intend to enact a law of such character as to invite and recognize the validity of a procedure that placed the soldier at the mercy of land speculators, instead of protecting him, and enable the latter class to procure the public lands at even less than the old cash entry prices.

The government enacts something for a purpose, and to such as showed their good faith by compliance with the conditions of the law and who thereby have demonstrated their allegiance to the government, their stability as industrious citizens and their capacity to become freeholders in a free country, the government makes these gifts of land which when acquired are of substantial value, and as the history of the disposition of our public domain has shown, of real value to the donee and to the nation largely in the proportion in which the acquisition of the lands was restricted to personal conditions.

Counsel have all along argued that these provisions of the law of 1872 were homestead provisions, restrict-

ed in their application, enacted as a modification of the former homestead laws, but upon the final submission of the cause argued inconsistently therewith, that the law is an utterly independent law and that none of the requirements of the old law have any application to it, unless specifically so indicated, and unless that is a sound argument the decision in this case cannot stand.

We submit that there can be assigned no valid reasons for such construction.

If the government had desired to bestow a gift of land unconditionally, it could easily have done so. If this was a transferable right, it was property. But it was not property; the soldier had nothing to sell. He might, under certain conditions, obtain a gift. Did he never exercise this privilege to enter additional land, it would not accrue to his estate, and there was nothing to descend to heirs, it could not be sold for debt.

The nature of the right, if such it may be called, is unmistakably the same and the acquisition of lands thereunder surrounded by the same restrictions, as the original grants, save as to residence and cultivation, and which conditions plainly by implication in the law, as well as by the construction of the executive department of the government, were allowed to be worked out on the other tract.

The case of Knight vs. Leary in the 54 Wis. does not decide what is claimed for it. It does decide that residence upon the second tract was not intended to be required by the government, and does decide that a valid power of attorney can be given to convey after acquired property, after it is acquired, whether it is obtained from the government or elsewhere, but it does not decide that a soldier may sell his additional

homestead before entry, or sell his right to enter it.

We defy the defendants in error to produce a single instance where the department has ever allowed an assignee of a soldier to enter an additional homestead as such, or in which the government has patented the same to him, or where the department has ever allowed an agent or an attorney to enter such a homestead, except under proofs either valid or perjured that the entry was for the benefit of the soldier and that neither the land nor the right had been alienated.

The argument that this class of instrument is a simple power of attorney scarcely needs consideration, and as stated before, the authorities upon which the defendants in error rest their cause, hold to the contrary and sustain them upon the other grounds.

Counsel would doubtless hold that if Boggs, assuming to act under this power of attorney, could deed the land to another for a nominal consideration and that the other should immediately deed it back to him for the same consideration, that Boggs would own the land. They would scarcely dare to argue that Boggs should be confined to the enjoyment of the consideration, and yet the farce was only to put another face upon what he already had, and by it he secured nothing more.

We therefore continue to urge that the instrument constituting the foundation of the claims of the defendants in error to these lands, is in violation of these provisions of the homestead law and of the plain purpose and intendment thereof, and undertakes to render subject to traffic, barter, sale and assignment, a right which is personal in its character, granted only to persons of certain classes, to be exercised by them upon certain conditions

not so given as to be clothed with the character of property before the acquisition of the land, not descendable to heirs or leviable for debt; and which, failing to exercise themselves, are granted by the same acts to other persons instead, and that any method or device in violation thereof is contrary to public policy, involves a fraudulent practice, necessitates the making of perjurious oaths and the acquisition of lands by a false pretense; all of which is clearly against public policy. That instead of being in keeping with the purpose to equalize the homestead gifts and grants, such a construction as is put upon the statutes grants and such rights unequal and in fact to change in support of this method, has a tendency to render such grants and such rights unequal and in fact to change the entire character of the grant. Hence we reassert that the first, second, third, sixth, seventh and eighth assignments of error are well laid.

The instrument relied upon in its intent and character being an attempted assignment of the homestead right, a right personal and non-assignable in its character, or an attempted alienation of the land before any act or thing done to acquire it, contrary to the provisions of the law applicable thereto, and being therefore utterly void, cannot work an estoppel upon the plaintiff's grantor to prevent her from exercising the right herself nor to convey the lands thus acquired after she had so acquired them.

This is sustained by the authorities hereinbefore cited by us and is not without force in this action.

Thompson vs. Doaksum, 10 Pac. 199.
Gilbert vs. Thomson, 14 Minn., 544.

The evidence in this case also sustains this view,

for notwithstanding this instrument, the government at a subsequent date recognized Mrs. Robertson's entry and granted the lands to her, and the defendants in error have made no contest of that entry and have shown no transfer from her and we submit therefore that the court erred in giving effect to the instruments of conveyance executed by said Boggs and in finding that the defendants in error were the owners of the premises and in not finding that the plaintiff in error was the owner thereof, and in not reversing the decision of the trial court, and in not ordering judgment to be entered in favor of the plaintiff in error as set forth in the third and eighth specifications of error. In fact all of the specifications of error become applicable.

The only power of attorney authorized or recognized by the statutes of the State of Minnesota is a simple power of attorney to act for and in the name of and for the benefit of another. Section 60, Chapter 44, General Statutes of Minnesota declaring that "the provisions of this chapter shall not extend to a simple power of attorney to convey lands in the name and for the benefit of the owner," Section 1 of that chapter reading as follows: "Powers, except as authorized and provided in this chapter, are abolished, and the creation, construction and execution of powers shall be governed by the provisions herein contained."

The standard definition of powers or letters of attorney, embodies substantially the same terms as embraced in Section 1 above referred to, as such definitions are given in Black's and Rapalje's Law Dictionaries.

Powers of attorney are construed strictly, and the authority is never extended by intendment or con-

struction beyond that given in terms. Section 358 Devlin on deeds.

Gilbert vs. How 45 Minn., 121.

This was not such an instrument as can be sustained as a power of attorney and the name thus given it is a misnomer, and we urge that the court erred in admitting it in evidence and in admitting in evidence the conveyances made by Boggs under it, and in finding thereon that the defendants in error owned the title to the premises, for the reason that it did not appear that Boggs had any authority to convey these lands, no authority to make such conveyances being shown or claimed other than such as existed by said so-called power, defendants' Exhibit 1.

We therefore respetfully submit that the errors assigned should be sustained and the decision made by the state court reversed and the questions here involved having been thus settled by the court of last resort, in harmony with the long continued determination thereof by the executive department of the nation, all difficulties, conflicts and inconsistencies will have been swept away and the result cannot be otherwise than salutary.

If our position is right and the position of the land department is right and the position of the defendants in error is wrong, the number of instances in which the law may have been circumvented cannot weigh with this court. Oft repetition of a wrong does not make a right, and there is, never has been and never can be any question of innocent purchasers involved in such cases. Respectfully,

DANIEL H. TWOMEY,
JED L. WASHBURN,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED
JAN 13 1896
JAMES H. MCKENNEY,
CLERK.

(15,144)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 161.

ALFRED F. WEBSTER, PLAINTIFF IN ERROR,

vs.

MILO J. LUTHER AND LOUIS ROUCHLEAU,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

CUSHMAN K. DAVIS,
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JOHN R. VAN DERLIP,

Counsel for Defendants in Error.

(15,144)

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 161.

ALFRED T. WEBSTER,

Plaintiff in Error,

vs.

MILO J. LUTHER and LOUIS ROUCHLEAU,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT.

1. *April 17th, 1874*, Mary A. Robertson, widow of James A. Robertson, deceased, located a homestead in the state of Missouri, and thereafter made final proof at the Booneville, Missouri, land office.

2. *April 28th, 1880*, she gave an assignment of her additional homestead right to J. A. Boggs, wherein she made, constituted and appointed him her true and lawful attorney, authorizing and empowering him to sell, upon such terms as to him should seem meet, any lands then owned by her and obtained as an "additional homestead" under the provisions of Section 2306 of the United States Revised Statutes, and any lands she might thereafter acquire under said Act, and to receive for his own use and benefit all proceeds therefrom. This instrument was never revoked or annulled.

3. *January 20th, 1881*, patent was issued to Mary A. Robertson for her original homestead.

4. *April 7th, 1887*, Mary A. Robertson filed her application in the United States land office, at Duluth, Minnesota, to enter the lands in controversy in this suit.

5. *April 7th, 1887*, Boggs conveyed the lands in controversy to the defendants in error, and the conveyances were filed for record in the proper office April 15th, 1887.

6. *October 17th, 1890*, Mrs. Robertson gave to the plaintiff in error a quit-claim deed, purporting to convey said lands to him.

7. *January 23rd, 1891*, plaintiff in error, claiming title to said lands under said quit-claim deed, brought this action under the Statutes of Minnesota to determine the adverse claim thereto of defendants in error.

The case turns upon the effect to be given to the assignment of April 28th, 1880, and upon the construction of the Acts of Congress permitting additional homestead entries. The Supreme court of Minnesota construed the assignment as investing Boggs with the beneficial ownership of the Minnesota lands and power and authority to make valid conveyances thereof, and held that the additional homestead right was assignable.

In support of his appeal from such decision, the plaintiff in error has filed an elaborate brief in this court, the argument in which may be stated in the following propositions:

I.

That the instrument to Boggs was an attempted assignment of Mrs. Robertson's right to enter lands additional to her original homestead, and was invalid as such.

II.

That soldiers' rights to enter lands additional to their homesteads are not assignable.

III.

That this court is controlled upon the questions here involved by the rulings and decisions of the Department of the Interior.

ARGUMENT.

The plaintiff's argument does not always proceed uninterruptedly along the lines suggested, but, in its whole scope, it comprehends no other contentions than those we have stated.

The property involved in this suit is of comparatively small value, but there are law suits now pending, or which will be commenced if this one issue in favor of plaintiff in error, which will be numerous beyond calculation and involve property of so vast a value that one hesitates to hazard an estimate of the extent of the interests involved.

The titles to thousands of farms and thousands of acres of the most valuable timber and mineral lands in the United States will be affected by the determination of this appeal, and we will be pardoned if, for that reason, we indulge in a fuller presentation of the questions involved than might be deemed strictly called for by the amount involved in this single action.

The importance of this case can hardly be overestimated.

In behalf of the defendants in error, we beg to submit:

I.

The right to locate and enter lands additional to a soldier's homestead is personal property and assignable.

II.

Neither the rules nor the decisions of the general land office are controlling upon the courts on questions of law.

I.

The Right to Locate and Enter Lands Additional to a Soldier's Homestead is Personal Property and Assignable.

The question of the assignability of this right is one of statutory construction purely, and involves the consideration of a very few sections of the United States Revised Statutes. Those sections are: 2289, 2290, 2291 (being a part of the original Homestead Act of May 20th, 1862), and sections 2304, 2305 and 2306 (being the Additional Homestead Act of April 4th, 1872, as amended by later enactments).

By section 2289, every person who is the head of a family, *etc.*, shall be entitled to enter any quarter section, or a less quantity, of unappropriated public lands, to be located in a body, in conformity to the legal subdivisions of the public lands after the same have been surveyed.

By section 2290, the person applying for the benefit of the preceding section shall make, upon his application, affidavit that he is the head of a family, *etc.*, that such application is made for his exclusive use and benefit, that his entry is made for the purpose of actual settlement and cultivation, and neither directly nor indirectly for the use or benefit of any other person.

By section 2291, no certificate shall be given or patent issued until the expiration of five years from the date of such entry; and if, within two years from that time the person making the entry, his widow, or their heirs or devisees, prove by two credible witnesses that he, she or they have resided upon or cultivated the lands for a term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of the land entered has

been alienated (except under section 2288 for church, school, cemetery or railroad purposes), then patent shall issue.

Such were the means provided by the Congress, and existing in 1872, for acquiring homesteads under the laws of 1862. Let us consider them with a view to ascertaining the true intention of the government in such enactments.

Vast areas of public lands lay uncultivated, unoccupied and unclaimed in the then West. It was necessary that some inducement to take up these lands be extended in order to actuate persons residing in localities where safety and protection, roads, bridges, railways and canals, established local governments, markets, and, generally, the conveniences and comforts of life, prevailed, to undertake the privations and perils of pioneer existence. The purpose was to people the agricultural sections of the unsettled public domain with actual residents, who, making their permanent homes there, would build up and develop the territory. The inducement offered was a gift of 160 acres of public land to actual settlers, upon the precedent condition of five years' residence upon, or cultivation of, the lands entered.

Now, for such purpose, permanent occupancy of the land was essential. The object was not to dispose of the public domain, but to inspire settlement of the vacant territory. The advantage to the country at large was to flow not so much from the amount of land patented to purchasers, or others, as from the number of families moving out to occupy the lands. People were what was desired, not the mere disposition of the government lands. Cultivation, and the consequent development of the country, would be the inevitable result if permanent residents were secured; hence it was that applicants

were required to make their preliminary affidavit that the land was to be entered for their exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person.

When, at the expiration of five years, the proper officers were satisfied by competent testimony that the original applicant, or his widow, or their heirs or devisees, had resided upon or cultivated the land entered for the term of five years immediately succeeding the filing of the preliminary affidavit, and an affidavit was made that no part of the land had been alienated, the applicant, if a citizen, became entitled to a patent for the land; the requirements of the government would then be fulfilled; the purpose of the Homestead Act had been accomplished by there having been procured an actual, permanent settlement upon a tract of public land previously unoccupied.

It is to be noted that the land entered must be located "in a body" in conformity to the legal subdivisions of public lands. It frequently happened from this requirement that homesteaders were unable to enter the full quantity of land allowed by the statute, and contented themselves with smaller tracts, where, by reason of railroad grants or earlier occupancy, the adjoining lands had been removed from the operation of the law and the full quota could not be obtained.

All settlers who entered a homestead of whatever area thereby exhausted their right of entry.

At the close of the late war, thousands of Federal soldiers were returned to civil life without business or means of support for themselves and families, and large numbers of them took advantage of the provisions made by this statute. They had settled in large numbers in the eastern range of what were

really public land states at the close of the war. They were found by hundreds and thousands in Iowa, Minnesota, Michigan, Wisconsin, Missouri, Illinois, Indiana, and even in Ohio. Wherever they were within the limits of any land grant railroad, they held but 80 acres of land.

In order that the soldiers who had been honorably discharged from military service should not be less generously dealt with than those who had never enlisted, or who had come to our shores from other countries, and who had entered full quarter sections, the Congress passed the act of April 4th, 1872, entitled, "An Act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads of public lands of the United States." The act contained six sections, of which only the first two need be considered.

For convenience of reference, we quote these Sections of the original act in full:

"Section 1. Every private soldier and officer who has served in the army of the United States during the recent rebellion, for ninety days, or more, and who was honorably discharged, and has remained loyal to the government, including troops, *etc.*, shall, on compliance with the provisions of an act entitled 'An Act to secure homesteads to actual settlers on the public domain,' and the acts amendatory thereof, as hereinafter modified, be entitled to enter upon, and receive patent for, a quantity of public lands not exceeding 160 acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved.

"*Provided*, that said homestead settler shall be allowed six months after locating his homestead, within which to commence his settlement and improvement.

"*Provided*, that the time which the homestead settler shall have served in the army, navy or marine

corps aforesaid, shall be deducted from the time heretofore required to perfect title, or, if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served.

"*Provided*, that no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements as aforesaid.

"Section 2. That every person entitled, under the provisions of the foregoing section to enter a homestead, who may have heretofore entered under the Homestead Act a quantity of land less than 160 acres, shall be permitted to enter, under the provisions of this act, so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

Section 3 provides for a homestead entry by the widow or minor orphan children of the deceased soldier.

Section 4 enacts that the time of service in the army or navy, after the date of entry, shall be equivalent to residence upon the land, and provides for substituted locations where the first are lost by absence.

Section 5 allows entries to be made by an agent; and

Section 6 authorizes the commissioner of the general land office to make all needful rules and regulations to carry into effect the provisions of the act.

It is of importance to observe that section 1 gave the right to enter homesteads to soldiers who had not previously made homestead entries, and practically had the effect merely to make allowance for their terms of service in the army, by so much shortening the period of residence and cultivation required by the act of 1862.

To give a similar advantage to the soldier who had theretofore entered his homestead, section 2 was included in the act. By its terms, every honorably discharged soldier who had previously made an entry under the law of 1862, but had located less than 160 acres, was donated so much additional land as, when added to the quantity previously entered, should not exceed 160 acres.

This section 2 was not an amendment of the law of 1862, but was part of a separate and distinct statute enacted ten years after the original Homestead Act, treated of an entirely new and different subject and established an entirely different privilege for a new class of beneficiaries. Section 1 enlarged the quantity of land that a soldier might take as an original claim, authorized a preliminary filing reserving the land for six months prior to entry, and allowed credit for the period of military service. All this applies to an original claim, and, in respect thereto, extended greater rights, privileges and immunities. So, as to an original entry, the privilege of the soldier was munificently enlarged, but section 2 created an entirely new, separate and distinct right in the soldier who had, before passage of the act, made an entry under the old law for less than 160 acres. It had no reference to, or connection with, the old act, except to make an exercise of the right of entry under the original law a basis of the enjoyment of the new. An entry under the original act, and compliance with its terms, were qualifications entitling the beneficiary to the enjoyment of a new privilege and the acquirement of a new property created by section 2 of the act of 1872. The limitations upon that privilege and property, if any, must be found in the new statute, not in the old, which had no reference to them; we have, therefore, a separate

and distinct enactment, creating an entirely new right with no restrictions whatever upon alienation.

If section 2, instead of being enacted as a part of the act of April, 1872, had been passed at a later date in exactly the same words, except that it had provided that any person, entitled under the provisions of sections 2304 and 2305 of the Revised Statutes, should be entitled to the privilege therein conferred, would there have been any foundation for the contention put forward by plaintiff in error that the enactment was an amendment of, and to be construed in sub-ordination to, the act of May, 1862? Would there be any difference in the interpretation of the language in such a case? If it had been so enacted, it requires no argument to show that its construction would be governed by the rule so often announced, and to which we have already referred, that where the Congress enacts a plain provision without limitation, no limitation can be imposed by the court.

Prior to this additional act, the soldier stood in no better position than all the rest of mankind. His privileges, in respect to the homestead law, were those of any other citizen, and no greater. This act was a carefully devised measure to enlarge those privileges for the soldier, and, in view of his meritorious services, to place him on a better footing than others. This object was sought to be accomplished, in one way, by allowing him, when entering an original homestead on double minimum land, to take twice the quantity allowed to others. He was, also, relieved from the term of occupancy or cultivation prescribed by the original law, by having allowed him as a part of that time his period of enlistment and service in the army, but these provisions, which were

an advantage to original entrymen after April, 1872, did not work equal justice to all soldiers. Some had already taken homesteads of less than a quarter section and had thus exhausted their homestead rights, and it would have been inequitable to have left these less generously provided for than their tardier brethren.

They were in one of two positions; *first*, they had already complied with the law, resided upon the land for the required period and become citizens of the locality in which the land was situated, proved up their claims and received their patents; or, *second*, they were still living on their lands, in the act of complying with the law and giving the government the consideration required from the homesteader.

If of the first class, they had complied with all the conditions of the law for obtaining the full amount of land of the kind they had entered, and were as fully entitled to the gratuity which the government extended to its soldier-settlers as those who should make entry thereafter. To require them to again furnish the consideration of residence or cultivation in order to receive that gratuity would not be to put them upon an equality with entrymen under the new law.

We contend that every honorably discharged soldier who, prior to April, 1872, had entered a homestead of less than 160 acres and had made his final proofs, or received his patent, was immediately entitled, upon proof of such facts, to enter and receive a patent for such an additional quantity of unclaimed public land as, with his homestead, would not aggregate more than 160 acres. Nothing except selection of the additional land was required from such a settler. This additional land was not part of his homestead, but was a gift from a grateful country to its

loyal soldiers who had served it in time of need. The requirement of residence or cultivation for a homestead had been fulfilled and the soldier was entitled to 160 acres forthwith. Since some soldiers had acquired smaller allotments than 160 acres, by reason of lack of land in one location to make up a quarter section, or by reason of the land originally entered having been double minimum land, the Congress extended to them the favor given by the so-called "Soldiers' Additional Homestead Act."

If, on the other hand, they were within the second class, they were still required to continue in possession of their original entries in order to perfect their title to them; and they could not, therefore, by any possibility, comply with the conditions of the original law, upon an additional claim under the new law, without the cancellation of their first entries and the loss of the property which they had commenced to improve.

Hence, it is obvious that in respect to both of these classes, the Congress did not have in contemplation the application of the restrictions of the original law. The act of April, 1872, was designed to extend to all soldiers equally the beneficence of the government, without harsh or impossible conditions, and it accomplished that end by apt and fitting language. It was the clear intention of the Congress to discriminate in favor of the soldier, as against other homesteaders, and not to require a greater period of residence or cultivation from him in order to acquire a full quarter section of land.

It is a sufficient, and, indeed, an imperative, reason for not construing this act of April, 1872, as subject to the restrictions of the original law, that, if the Congress had so intended it to be interpreted and

enforced, it could easily have made such intention to appear by express language.

That our contention of the construction of the act of April 4th. 1872, was the one intended is apparent from the amendment of that law of June 8th, 1872.

By that act, the act of April was re-enacted, with the exception that section 2 was altered so as to read as follows:

"Section 2. Any person entitled, under the provisions of the foregoing section, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter, under the provisions of this act, so much land, *contiguous to the tract embraced in the first entry*, as, when added to the quantity previously entered, shall not exceed 160 acres."

Section 2 was altered by the insertion of the words we have italicized.

Within two months after conferring the additional homestead right, the Congress was induced to add this limitation. What led to this change is a matter of history, at least in the Land Department. The act as passed in April was unsatisfactory to the then commissioner of the General Land Office, who practically suspended its operation until the Congress re-enacted it in June with the restriction we have noted.

The result was exactly what should have been expected. The briefest practical trial of it demonstrated its inutility. Of course, no one when entering a homestead would fail to take the full quantity of land permitted by law, and would only enter less by reason of inability to locate the full quantity "in a body." Except in the unusual cases of abandonment or cancellation of entries previously made, the right to make additional entries under the act of June, 1872,

was nugatory, *because there were no lands contiguous to the tracts embraced in the first entries.*

Accordingly, within nine months, the Congress passed the Act of March 3rd, 1873, amending the act of June 8th, 1872, by striking out the limitation grafted upon section 2 by that act, and by omitting also the clause, "*under the provisions of this act*," which was a part of the original section. Without that repeal the act of June, 1872, was a dead letter, utterly ineffectual, and bringing no advantage to those whom it nominally benefitted.

Section 1 of the act of June 8, 1872, constitutes Sections 2304 and 2305 of the Revised Statutes of the United States. The act of March 3, 1873, constitutes section 2306 of the Revised Statutes, the words "section 2304" therein being inserted in the revision in place of the words "section 1" in the original enactment.

Lest it might be claimed that the arrangement and classification of these sections in the Revised Statutes would require them to be construed as a part of, or *in pari materia* with, the original Homestead Act, the Revised Statutes contain the following provision:

"Section 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

The enactment of June, 1872, was a conclusive congressional construction of the act of 1872, to the effect that under it no residence or cultivation of the additional tract was required, and this construction, and the clear intention of the Congress, were put beyond the pale of doubt by the act of March 3rd, 1873,

which removed the restriction imposed in June, 1872, and permitted locations of additional homesteads upon any unappropriated public lands wherever situated.

It was not, therefore, required by law that one entering land under section 2306 must swear that his entry was made for the purpose of actual settlement and cultivation. And, when actual residence on the additional land was made impossible by law, the other provisions of the original Homestead Act became inapplicable. If the land was not to be actually lived upon by the soldier, no policy of the government was infringed in permitting an entry by him for use or occupancy by another. If it were not to be used or occupied by the entryman, it could only be available for the use and occupancy of some one else, and the Congress must be held to have had this in contemplation in the passage of the additional homestead law. The only purpose, consequently, of this gift of additional land was to enable the soldier to employ it in any manner that he might deem most beneficial to himself. If he could not dispose of it, he could obtain no advantage under section 2.

An additional homestead situated at a distance from the original one would be of *benefit* to the applicant in no way except for the purpose of sale; and of no *use* at all to him, if by that word be meant the actual tillage of it.

If this be true, an affidavit as to any of the matters called for by section 2290 would be morally impossible; and the construction of the statute demanding perjury for its fulfillment would be rejected.

Anderson vs. Carkins, 136 U. S. 135.

Hence, the only real and substantial value of the additional right conferred by the law of 1872 was

the inherent power of sale accompanying the gift. If the soldier must exercise the right in person, and in his own behalf, the gratuity, as we have seen, was valueless. If, however, he could sell and assign it to those whose situation made it useful to them, he would be at once placed in possession of a right of substantial pecuniary value. And the Congress knew this. It intended to give the soldier bread and not a stone, and it did it by language not to be misunderstood under any fair and reasonable construction.

If the soldier entering land under section 2306 was not required to make affidavit that he entered it for the purpose of actual settlement and cultivation, how can it be claimed that he must swear to the remainder of the affidavit required by section 2290? It is impossible for plaintiff in error to point out any law or part of a law providing for such new and modified affidavit.

Plaintiff in error asserts that the right to the additional homestead is a purely personal right that can be exercised by the soldier himself and no one else.

"It is personal in that only they of a certain class can avail themselves of the gift. It is not personal in the sense that future services or future conditions are imposed. Services already rendered during the war are the consideration. The homestead duty of occupation and improvement has already been performed. In view of what has been done, the Congress makes this gift. It places no restriction on the donee, but leaves him to use the gift as he sees fit." *Per* BREWER, *Judge*, *Mullen vs. Wine*, 26 Fed. Rep. 206.

It is hard to add anything to that concise answer to the contention of plaintiff in error.

To the argument of plaintiff in error that the right is a purely personal one, will not descend to heirs and

cannot be levied upon for debt, and, hence, is unassignable, it seems a sufficient answer to say that it is an optional right, and that, until the option to avail himself of the benefit of the act is exercised by the soldier, it is a merely inchoate right; but, upon the soldier's election to take advantage of this law, which may be evidenced by his execution of an assignment of the right, or by the execution of a power of attorney to enforce it, it becomes an actual and existing property interest. Courts will uphold assignments not only of choses in action but of contingent interests and expectations and of things having no actual present existence, but resting in mere possibilities, not as a transfer operative *in praesenti*, for that can only be of things *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*. Such assignments are enforced on the ground that the assignee is entitled to have an immediate specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor, who thereafter holds it in trust for the assignee.

The acts of Congress must be so construed as to render their various provisions consistent and possible of enforcement. No other interpretation than that we have suggested can be placed upon these Homestead Acts so as to render them all harmonious and capable of practical operation. Not only do all canons of statutory construction require the court to hold that the Congress intended what is the only rational effect of its legislation, but common sense demands that the construction which we have set out in this brief shall be placed upon the congressional Acts.

The privilege conferred by section 2 of the act of April, 1872, (section 2306 U. S. R. S.) is alienable

for the reason that it is a valuable right to personal property without any prohibition placed upon its assignment. The right of full control and absolute power of disposition is an incident of ownership; and this right exists, not because conferred by statute, but because no statute prohibits it.

The privilege in question is a valuable right and personal property until actual location or entry of the land, when it becomes an interest in realty.

An examination of the authorities demonstrates that it is only when some statute prevents the sale or transfer of such rights that the courts have held them non-assignable.

Myers vs. Croft, 13 Wall, 291.
Thredgill vs. Pintard, 12 Howard, 15.
Maxwell vs. Moore, 22 Howard, 185.
Doe vs. Wilson, 23 Howard, 458.
Lamb vs. Davenport, 18 Wall., 307.
Mullen vs. Wine, 26 Fed. Rep., 206.
Rose vs. Wood and Lumber Company, 73 Cal., 385.
Camp vs. Smith, 2 Minn., 172.
Townsend vs. Fenton, 30 Minn., 531.
Knight vs. Leary, 54 Wis., 459.
Graham vs. Henry, 17 Tex., 165.

Myers vs. Croft, *supra*, arose under the pre-emption laws, the restricting language in which was as follows: "And all assignments and transfers of the right hereby secured, prior to the issue of the patent, shall be null and void." In that case the sole question was whether, after entry and payment for the land, but before the issuing of the patent, the pre-emptor might sell the land. It was urged upon the argument that because the statute plainly prevents assignments and transfers of the right, it must be

held to intend to prohibit the pre-emptor from the alienation of the property which he had acquired under that act, until patent issue. The court, after careful consideration of the whole statute, concluded that the intention of the Congress was only to restrict the pre-emptor from assigning his right to enter the land, referring to which the court said:

"This was a right to pre-empt a quarter section of land by settling upon it and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and, independently of the legislation of Congress, assignable. *Thredgill vs. Pintard*, 12 Howard, 24. The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his rights and paid the government for his land."

So, in the case of soldiers' additional rights, the object of the Congress was attained when the soldier fulfilled the conditions required to entitle him to his original homestead.

The court continued:

"Restrictions upon the power of alienation after this would injure the pre-emptor and could serve no important public policy."

The application of this language to the rights under consideration is manifest.

In the case now before the court, Mrs. Robertson had located her original homestead of less than 160 acres in Missouri in 1874; she was the equitable owner of it and entitled to a patent (under the act of 1862) in 1879; she thereupon became immediately entitled to an additional quantity of land to make up 160 acres. The moment she filed upon the land in controversy at the Duluth land office, it was segregated from the public domain and the United

States was thereafter merely trustee of the title for her. This is a doctrine which this court has frequently recognized.

The case of *Thredgill vs. Pintard*, cited in the opinion in *Myers vs. Croft*, was one in which the sale of such a right, under a law containing no limitation upon alienation, was sustained. The case arose under the act of April 12th, 1814, granting the right of pre-emption to settlers upon certain portions of public land when the Indian title should be extinguished.

If the right of pre-emption in that case, which was a mere personal right to be exercised by actual settlement, were personal property and assignable, we fail to see why the right of a soldier, already earned by honorable service and by actual settlement and residence theretofore had, is not equally assignable.

In *Maxwell vs. Moore, supra*, the court was called upon to construe the acts of May 22, 1826, and of May 6th, 1812, granting bounties to soldiers who had served in the war of 1812. The act of 1812 contained this section:

"Section 4. That no claim for the military land bounty aforesaid shall be assignable or transferable in any manner whatever until after the patent shall have been granted in the manner aforesaid. All sales, mortgages, contracts or agreements of any nature whatever made prior thereto for the purpose or with the intent of alienating, pledging or mortgaging any such claim, are hereby declared, and shall be, held null and void."

One Allen McVey had served as a regular soldier in the war of 1812 and became entitled to a tract of 160 acres of land under this act. The land was located and granted in what is now the state of Arkansas. Many tracts of land entered under this act turned out to be worthless and unfit for cultivation.

As a compensation the act of 1826 was passed, giving to a soldier or to his heirs to whom such worthless bounty land had been patented, the right to relinquish such land to the United States and locate a like quantity elsewhere in the district. This act of 1826 contained no limitations upon the right of sale or alienation, either of the claim or of the land, after entry and before patent. McVey, by virtue of the provisions of the latter act, surrendered his first patent and, in 1834, sold his right to enter to one Pelham, and gave him a bond to convey the land that might be entered on his certificate of surrender, as well as power of attorney to locate same and obtain the patent. McVey died in 1836. In 1842 Pelham entered the land in controversy in McVey's name. Afterwards plaintiffs in error obtained a conveyance from the heirs of McVey and commenced an action of ejectment against the grantee of Pelham.

One question presented in the case was whether the act of 1826 carried with it the prohibition against the alienation of the right, or of the land before patent, which appeared in the act of 1812. The court held that it did not, and said:

"It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no reason why the soldier who removed to Arkansas and inspected his tract of land then patented, and alienable, should not contract to convey the tract he might get in exchange. We can only say, as we said in the case of *French vs. Spencer*, 21 Howard, 238, that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that when the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."

French vs. Spencer was a case calling for the construction of a similar act of 1816. By an act passed in that year, the Congress gave a bounty in land to those American citizens who were, at the commencement of the war of 1812, inhabitants of the province of Canada, and who during that war joined the army of the United States as volunteers. It was insisted that this act was a part of the general plan of the Congress to reward soldiers who had served in the war of 1812 by grants of land and that, being a part of such original scheme, it was *in pari materia* with the acts of 1811 and 1812, which contained a provision declaring that such bounty should not be assignable or transferable until after patent was issued. The act of 1816 contained no limitation upon the right of alienation. It appears that Attorney General Wirt had given several opinions sustaining the contention referred to and holding that the land warrant issued to a Canadian volunteer under the act of 1816 was not assignable upon its face or in fact.

The court said:

"Congress may have thought it not at all necessary to guard the Canadian volunteers against being over-reached by speculators, and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5th, 1816, has no reference to, or connection with, any other bounty land act; it is plain on its face and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on the part of the judicial tribunals legislative power; it is, that when the Legislature makes a plain provision, without making any exception, the courts can make none."

We especially desire to direct the court's attention to that part of the opinion (not quoted) where the court says that it was the intention of this act to reward these soldiers for extraordinary service,

and that it did not seem necessary for the Congress to guard these volunteers against being over-reached by speculators. This argument is just as forceful in respect to the soldier's additional rights involved in the case at bar. It is urged here that it was the intent of Congress to protect the soldiers against speculators; nothing of that character is apparent in the act, and the court has no right to legislate upon the subject. In fact, for the Congress to have endeavored to protect them by preventing a transfer of this right, would, as we have already suggested, have rendered the right valueless.

Doe vs. Wilson, supra, grew out of the treaty of October, 1832, between the United States and the Pottawatomie Indians, under which their reservation was ceded to the government. To certain of the Indians the United States agreed to issue patents of certain quantities of land. One of these was a chief, Pet-chi-co, to whom two sections of land were to be conveyed. The treaty provided: "The foregoing reservation shall be selected by the president of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public survey."

Before the lands were selected, Pet-chi-co sold and assigned his interest and died before patent was issued. After his death the patent was issued in his name, and his assignee claimed title thereto by virtue of his assignment. The plaintiff in error claimed under a deed from the heirs of Pet-chi-co, made upon the assumption that their ancestor's deed was void. The only question which the court felt called upon to decide was in relation to the validity of that deed. The court said:

"Although the government alone can purchase lands from an Indian nation, it does not follow that, when the rights of the nation are extinguished, an individual of the nation, who takes as private owner, cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited its sale."

The Supreme court of Texas has probably been called upon to pass upon more land questions than any other court in America, and its decisions are of peculiar weight in respect to such controversies. Under various statutes of the Republic of Texas, parties who had taken public lands became entitled to additional grants. It is unnecessary to go into a lengthy examination of these statutes. The nature of the right conferred by them is very similar to the soldier's additional right, and in some cases was granted to soldiers as bounty for military duty. It is sufficient to say that prior to an act of January 4th, 1839, these various acts contained no restriction upon or prohibition of the alienation of the rights thereby conferred, and some of the subsequent statutes did not contain such a prohibition.

In the case of *Graham vs. Henry*, *supra*, the Supreme court of Texas considered the nature of this right and established its assignability. We quote at some length from the opinion in this case because it expresses so clearly the general principles which we advocate here.

The court said:

"The certificate was issued under the 29th section of the land law of the 14th of December, 1837. (Hart. Dig. art. 1865.) Neither that act nor any other in force at the time contained any prohibition or restriction upon the power of the grantee to sell and dispose of his interest as soon as it was acquired. Such a restriction was first introduced by the Legislature of the Republic in the act of the 4th of Janu-

ary, 1839, in respect to claims for land acquired under that act. (Art. 1924.) It had no application to claims acquired under the former law. In general whatever is susceptible of exclusive, individual appropriation may be the subject of bargain and sale; so that property, considered as an exclusive right to things, implies not only a right to use, but a right to dispose of them. Whatever exclusive right a man has in anything, he has a right to dispose of absolutely, as he pleases, provided he makes no disposition of it prohibited by law. It matters not what advances he has made toward acquiring the ultimate dominion, or absolute and complete proprietorship; the moment he has acquired an exclusive interest, though it may be but a contingent and executory interest, he may dispose of it at pleasure, subject only to the condition that it is not forbidden by law. Hence, any incipient title or contingent interest, which is susceptible of being ripened into a title to land, may be assigned; and such has been the usage in this and other countries. It has never been supposed necessary to consummate the title before the right could be assigned. The conditional certificate vested in the grantee an interest or right which is capable of being perfected into a title. It was a contingent interest, it is true, subject to the condition that he and his family should remain and reside within the Republic and perform all the duties required of other citizens, for the term of three years, after which he should receive 'an unconditional deed' for the land. (Id.) But, though a contingent, still it was an exclusive, interest, or a right which was assignable in equity, and the transfer might be enforced if made for a valuable consideration. Of course, the interest or right of the assignee would ultimately depend upon the performance of the precedent conditions by the grantee. He would take subject to that contingency. But there is nothing in the nature of the interest which the conditional certificate conferred to prevent its assignability.

"But, though not forbidden by any express law, it is said the assignment of these conditional certificates ought not to be upheld, because contrary to public policy. It is not perceived in what respect it is so, or what difference it would make to the state, or any one but the parties themselves, whether the right re-

mained in the grantee until the conditions of the grant were performed, or passed to his assignee. The law does not undertake to interfere in the private contracts of men, unless they are such as affect injuriously the rights of others or are inimical to the interest and well-being of society. And, when they are to be so deemed, it has generally been left to the Legislature to declare. The courts would hesitate to go in advance of legislation in declaring contracts void on the ground of public policy; and, where the Legislature has not spoken, they would not interpose unless upon a legal necessity arising from precedent and authority. *The express prohibition of sale in the act of 1839 and subsequent acts, evidences the belief on the part of the Legislature that without such prohibition the power would exist*, as we think it undoubtedly did. And we do not think the courts would be warranted in denying the assignability of these certificates on the ground of its supposed repugnancy to public policy."

Numerous cases in the same court have held similar certificates to be personal property and subject to sale as such. See

Simpson vs. Chapman, 45 Tex., 566.
Stone vs. Brown, 54 Tex., 330.
Hearne vs. Gillett, 62 Tex., 23.
Barker vs. Swenson, 66 Tex., 407.

In the case of *Lamb vs. Davenport*, 18 Wall, 307, the proposition is emphatically laid down by Mr. Justice MILLER that, subject to the rights of the United States to dispose of her own property, "parties in possession of the soil may make valid contracts even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions upon such contracts." The facts of this case are worthy of some attention. On the 27th of September, 1850, the Congress passed what is called the "Oregon Donation Act", 9th Stat. at Large, 496. By

the 4th section, the act gave, on certain terms, to every actual soldier (if a single man) a certain amount of land, 320 acres, and, if a married man, twice the amount. In this latter case, "one-half to himself and one-half to his wife to be held by her in her own right." This act also contained the following proviso: "Provided, that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the lands to which he or they may be entitled under this act, before he or they have received patent therefor, shall be void."

Prior to the passage of this act there was no provision of law, territorial or national, by which a person could acquire title to any of the public lands of the United States, in that territory. Nevertheless, it had been the practice for settlers to make what is known as "claims" and to sell and dispose of the same as though the parties originally making the claim had acquired some title or right. Prior to March 3rd, 1849, one Lownesdale was in possession of one of these claims, consisting of a tract of 640 acres. He laid this tract out in lots and blocks which he offered for sale, and several lots were sold, and a town grew up on them, which is now the city of Portland. On the 30th of March, 1849, Lownesdale transferred his claim to one Coffin, and Coffin agreed to endeavor to obtain title to the whole tract from the United States, and both parties agreed that they would contribute equally to all expense and divide equally the proceeds of sale, *etc.*, as long as the agreement should remain in force, and that, when it should be dissolved by consent, Coffin should convey to Lownesdale one-half of the land remaining unsold. In November, 1849, Coffin conveyed two of the lots in dispute to one Fowler. In December, 1849, Lownesdale and Coffin took into their partnership,

if it may be so called, one Chapman. In March, 1852, the three partners, by deed, entered into certain covenants with each other, under seal, reciting that, in order to obtain title from the United States, it was necessary that each should designate the particular portion of said lands claimed, which each by agreement with the other claimed, and agreeing that, after obtaining title from the United States, each patentee should fulfill all the contracts he had made with the other parties, or with other persons, and would make good deeds for the lots patented to him, which had been sold by the said partners jointly, or any of them separately. On the 11th of March, 1852, Lownesdale made his designation under the Donation Act of the part of land claimed by him. A patent certificate issued to him October 17th, 1860, and January 6th, 1865, a patent was issued to him which conveyed the lots in question. One of the questions necessarily determined by the court was whether this contract of March 10th, 1852, which was made after the act was passed containing the proviso prohibiting future sales, but which referred to contracts and sales made prior to the passage of the act, was void. The court said:

"It is said that the proviso to the 4th section of the Donation Act renders void the agreement between Lownesdale, Coffin and Chapman. The proviso referred to declares that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he may be entitled under the act, before he or they have received a patent therefor, shall be void. This act on its face intended to cover settlements already made, and the careful limitation of this proviso to *future* contracts of sale, that is, sales made after the passage of the act, *raises a strong implication of the validity of such contracts made before the passage of the statute.* It was well known that many actual settlers held under such contracts, and while the Congress

intended to protect the donee from future improvident sales, it left contracts already made undisturbed."

In connection with this last quotation from the opinion in *Lamb vs. Davenport*, we wish here to call the court's attention to two acts of Congress which, in our opinion, expressly recognize the validity of assignments or transfers of soldiers' additionals. One of the acts referred to is the act of March 2nd, 1889 (25 Statutes at Large, 854), entitled "An Act to withdraw certain public lands from private entry, and for other purposes." By this act the public lands were withdrawn from pre-emption except as therein stated. Section 6 is as follows:

"Section 6. That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than 160 acres, and received the receiver's final receipt therefor, *shall be entitled under said laws to enter as a personal right and not assignable*, by legal sub-divisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed 160 acres; *provided*, that in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws, resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws; *provided*, also, that this section shall not be construed as affecting any rights as to location of soldier's certificates heretofore issued under section 2306 of the Revised Statutes."

This section makes the additional homestead rights "personal and non-assignable," and, as if fearing that even this language would not prevent the transfer of such rights, the Congress inserted the pro-

viso in the section, clearly showing that it at least considered the rights granted under the prior statute (section 2306) to be assignable. It furthermore, by the second proviso, expressly recognized the validity of assignments of soldiers' additionals theretofore made. As said in *Lamb vs. Davenport*, these provisos, limiting and restricting the alienation of future additionals, and stating that they shall not be construed as affecting soldiers' additionals theretofore located, raises a strong implication of the intention of the Congress to recognize, and, in fact, does recognize the validity of assignments of soldiers' additionals theretofore made.

The two committees of the Congress having principally to do with framing this act were in the main able and skilled lawyers, intimately acquainted with these questions and undoubtedly had in view the protection of these rights. The proviso in question as shown by the Congressional Record was adopted in conference, and among the conferrees on the part of the Senate was Senator Teller, the former distinguished Secretary of the Interior, who, in changing the rule as to filing of soldiers' additional, was so careful to fully protect and preserve these outstanding rights which had been theretofore assigned and guaranteed by the faith of the United States. No one knew better than he the number of these assignments and the enormous interests they involved. No one knew better than he the homes the titles to which depended upon these assignments, and it must be presumed that these provisos were drawn intending to protect these very rights.

The other act to which we refer is an act approved June 16, 1880 (21 Statutes at Large, 287), entitled: "An Act for the relief of certain settlers on the public

lands, and to provide for the re-payment of certain fees, purchase money and commissions paid on void entries of public lands."

Section 1 of this act provides:

"That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior, that *innocent parties* have paid the fees and commissions and excess payments required upon the location of claims under the act entitled: "An Act to amend an act entitled: 'An Act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March 3d, 1873, and now incorporated in section 2306 of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon cancelled, the Secretary of the Interior is authorized to repay to such *innocent parties* the fees and commissions, and excess payments paid by them," *etc.*

The words "innocent parties" used in this section must refer to assignees and purchasers of these claims, because a soldier who had made a fraudulent claim to the right to enter lands under section 2306 would clearly not be an "innocent party," and the Congress certainly would not have provided for the repayment of these fees to innocent purchasers or assignees unless it had recognized their absolute right to acquire claims which are not "fraudulent."

We have cited and quoted at length from the foregoing authorities and statutes not alone for the purpose of establishing that soldiers' additional homestead rights must, upon principle, be assignable, but also, as we think they do establish beyond controversy, the proposition that where a statute is passed conferring a right, of substantially the same character, upon the same class of individuals who have

been the beneficiaries of prior legislation, yet, if the statute conferring such later right contain no restriction upon alienation, the court will not, by way of construction and considering the two acts as *in pari materia*, import into the second act a restriction contained in the first.

What were the purpose and effect of the exclusion of the clause, "under the provisions of this act" from the amended act of March, 1873?

The logical and able arguments respecting this question contained in the opinions of Judge Ensign of the District court (page 19 of the transcript), and of Chief Justice Gilfillan of the Supreme court of Minnesota (page 26 of the transcript), leave nothing to be added by us, and, for the purpose of brevity, we refrain from introducing here arguments, entirely unanswered by plaintiff in error, demonstrating that the exclusion of the clause referred to reflected the intention of the Congress to remove any possible restriction from the free assignment and disposal of these soldiers' additional homestead rights.

The question which we have been considering of the assignability of these rights has been the subject of direct judicial consideration and adjudication in the following jurisdictions:

Arkansas:—

Nichols vs. Council, 51 Ark., 26.

Washington Territory:—

Mackintosh vs. Renton, 2 Wash., 121.
S. C. 3 Wash., 436.

U. S. Circuit Court, District of Colorado:

Mullen vs. Wine, 26 Fed., 206.

Wisconsin:—

Knight vs. Leary, 54 Wis., 459.

California:—

Rose vs. Wood and Lumber Co. 73 Cal., 385.
Grant vs. Oliver, 91 Cal., 158.
Montgomery vs. Land Bureau, 94 Cal., 284.

Utah:—

Montague vs. McCarroll, 36 Pac. Rep., 50.

Minnesota:—

Webster vs. Luther, 50 Minn., 77.
Piper vs. Iron Co., 51 Minn., 495.
Whitesides vs. Rutan, 53 Minn., 520.
Bradley vs. Whitesides, 55 Minn., 455.

U. S. Circuit Court, District of Minnesota:—

Pourier vs. Barnes, 57 Fed. Rep., 956.

U. S. Circuit Court of Appeals, 8th Circuit:—

Barnes vs. Poirier, 64 Fed. Rep., 14.

In all the cases above cited, the first two only hold in opposition to the doctrine of assignability of soldiers' additional rights, and neither is an authority upon the question.

In *Nichols vs. Council*, the facts before the Supreme court of Arkansas furnished no foundation for the opinion, in that it appears from the express statement of the court that the record failed to show whether the land in controversy in that suit was entered under the provisions of section 2306 or not; so that, at most, the opinion referred to is a mere *dictum*.

In the Washington case there was no discussion of the question whatsoever, the record showing that it was admitted by both parties to the suit that the transfer of the soldier's additional right was invalid. That action was instituted by the plaintiff to recover

the purchase price of certain "scrip" for the location of certain soldiers' additional homestead rights, and the complaint alleged that plaintiff was entitled to recover because such rights were not assignable. The defense interposed was that the parties to the attempted assignment were *in pari delicto*, and that the court would give relief to neither party to an illegal contract. The opinion in this case, therefore, is also nothing more than *dictum*.

But, assuming that in both of these cases the question here under discussion was fairly presented for decision, the entire lack of any logical argument in either opinion, and the strong array of *contra* authorities, entitle these two cases to little consideration.

On the other hand, in the numerous decisions of the state and federal courts holding such rights assignable, the fullest discussion of the subject from every point of view has been given the question.

We shall not quote at length from any of these decisions, but from 1882, when the case of *Knight v. Leary* was decided by the Wisconsin Supreme court, down to the present time, no plausible argument against the position then taken by that court, and since sustained by the other courts to which we have referred, has ever been advanced. The attention of this court is earnestly asked to these decisions, and especially the opinion of Judge Sanborn in the Circuit Court of Appeals.

In concluding our argument upon this point, we feel justified in making reference again to the innumerable titles that will be unsettled and the endless litigation that will be instituted by the holding by

this court that these additional homestead rights are not assignable. For almost a quarter of a century these additional homestead rights have been, as we think this court should take judicial knowledge, the subject of frequent and continuous sale and exchange. Thousands of entries have been made under them by, and allowed by the General Land Office to, others than soldiers themselves. Through all these years until recently the titles thus acquired have stood practically unassailed, and generally recognized as valid and unassailable. Immense sums have been invested in the purchase of these lands, and as much more has been expended in making lasting and valuable improvements upon them. Dealing in these titles has been encouraged by the decisions supporting them, to which we have referred, and has been carried on in the belief that those decisions have established for all time the validity of the assignments by soldiers and the validity of the titles acquired thereunder. Unless, therefore, such assignments can be upheld by no possible rational construction of the acts of Congress involved in the subject, these decisions should not now be overruled and the titles to the enormous quantities of land affected by them upset.

Even if there were room for reasonable doubt as to the accuracy of the decisions rendered by the different courts in favor of the assignability of additional homestead rights, this court would be justified in adopting the well-known rule of all courts that decisions which have become rules of property should rather be allowed to stand, although they might be differently established if the question were one of first impression, than that they should be now reversed; thus accomplishing the end that the law should be settled and endless litigation not be invited.

It is therefore respectfully submitted that the right conferred by the act of April, 1872, (now section 2306, U. S. R. S.) was a personal right and property which could be assigned by the soldier entitled to enjoy it; that this must be held to have been the intention of the Congress in enacting the law, inasmuch as, without the right of alienation, the additional grant would be practically valueless, and because there is no prohibitory clause in the enactment and this court has no power to attach a prohibition to it by judicial legislation.

II.

The Rulings and Decisions of the General Land Office upon Questions of Law Have No Controlling Influence upon the Courts.

It is true that of late years the General Land Office has seen fit to construe soldiers' additional homestead rights as unassignable. If, however, the fair and proper construction of section 2306 be such as to permit an assignment, it is immaterial (except to those who have been deprived of rights by the adverse rulings of the land office) what the opinion of the commissioner may have been.

Notwithstanding the statements to the contrary in the brief for plaintiff in error, we believe we may assert the fact to be that from 1873 to 1883, with the exception of about one year from 1876 to 1877, the Land Department recognized, and treated as valid, assignments and transfers of soldiers' additional rights in various forms. Prior to 1877 the method most resorted to for a transfer of this right was by power of attorney, completed in form, or in blank.

Direct assignments seem rarely to have been used, but the assignment was accomplished by powers of attorney to locate, to sell, or to locate and sell, which were circulated in the market and sold as valid transfers of the soldier's right. We believe that this method arose by reason of the fact that the procedure under the Soldiers' Additional Homestead Act was to be regulated by the Department of the Interior, and its circulars provided for the entry of the additional homestead in the name of the soldier, either by the soldier in person or, as later expressly authorized, by his attorney or agent; hence the system of assigning rights by powers of attorney to locate and to sell, came into existence. This plan may also have been influenced by the well-known opposition of the then commissioner of the General Land Office to the recognition of any assignment of their rights. As we have stated in the previous point in this brief, the commissioner practically suspended the operation of the act of April, 1872, until its modification by the act of June, 1872, restricting the right of entry to land contiguous to the first entry. After the law was thus changed, it was put in operation by a circular of instructions, June 13th, 1872, signed by the commissioner of the General Land Office (but never approved by the Secretary of the Interior) which expressly limited the right to contiguous lands. After nine months' experience it was demonstrated that the soldier received no substantial benefit from the law, and the act of March, 1873, striking out the requirement that the additional land should be contiguous to the original homestead, was passed. That was the only clause found in the act of June, 1872, upon which any restriction or limitation of the right of assignment was based. The practice of assigning these rights by powers of attorney prevailed until

the circular of Secretary Chandler of May 17th, 1876, at which date the secretary took positive ground, not only against the right of assignment, but against any location whatever by attorney, and by his cirular directed that thereafter all applications should be made in person. His positive directions in this regard, quoted here to more thoroughly explain his subsequent action in the premises, were as follows:

"I have, therefore, to direct that the instructions embodied in your circular of August 5, 1874, be revoked, and that in future all persons entitled to enter additional homesteads be required to make their applications in person, with due proof of identity, at the land office of the district in which the desired land is situated, and that the affidavit required by the regulations of this department upon such application be made before the register or receiver of such office; and, further, that no entry of such homestead be permitted by attorney. * * * * * * * *

"The right to make the entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge, or other disposition of his right to make the entry, or the land which he applies to enter."

A careful reading of this opinion of Secretary Chandler will show that he recognized that very many of the provisions of the original Homestead Act were not imported into the "soldiers' additional" act, which is now section 2306. And the department has never, by practice, circular or instruction, imported into the act of 1872 the requirement for a final affidavit contained in section 2291.

This decision of Secretary Chandler was a simple annihilation of every substantial right possessed by the soldier, and the destruction of every property right vested under the assignment in third persons. The result was exactly what might have been anticipated. The inequity and injustice of this action soon

became apparent, and so great was the demand for relief, that Commissioner Williamson felt justified in calling the matter specially to the attention of the secretary in an elaborate report (Copp, p. 481, *et seq.*), wherein he said :

"The right of original entry is granted by section 2289, enlarged by section 2304, and the mode of entry and proof is prescribed by sections 2290 to 2294, inclusive, modified as to requirements respecting residence by sections 2305 and 2309. These statutes require formal application and affidavit of a particular import, and proof of certain specific continuing acts of settlement and improvement, as a prerequisite to the obtaining of a patent.

"Section 2306 stands alone, and confers a naked, unrestricted right of entry, limited only to the person who has already done the preliminary acts of entry required by the previous sections and to the quantity of land to be obtained. It imposes no additional conditions, requires no further affidavits, and is entirely silent respecting the manner of making the formal entry or of the application therefor.

"All the rules which have been prescribed by the department are in effect purely arbitrary and constructive—simply enabling acts to bring the party to the enjoyment of his right, left unclothed by the law, to be carried into effect by the departmental instructions in the manner most in harmony with current practice under the general system.

"If no further conditions are imposed with respect to this, it would seem naturally to follow that it became a vested right the moment the act was approved, and whatever of interest it contained was absolute, and subject to be enjoyed in any manner not repugnant to law.

"If the party living, for instance, in Ohio and Michigan, where the homestead privilege was nearly exhausted for want of lands, desired to enter a tract in California, he should not be prevented by stringent regulations from so doing. It is not in the nature of things that his new entry could be attached as an appendage to his home farm, and there could be no purpose in the statute to prevent its alienation to some party in its locality who might want it for an actual

residence or for other purposes the moment it was acquired. The whole doctrine and theory of American law tend to discourage and remove restrictions upon the alienation of property, and every judicial decision with which I am acquainted goes to the extremest point allowed by statutory construction in the same direction. To this import is the familiar case of *Myers vs. Croft*, in 13th Wallace, so often cited in your department, and referred to in my predecessor's report to you of May 9th, last.

"In brief, then, I am of the opinion that, disconnecting the provisions of section 2306 from the machinery provided by the sections relating to the original entry, and thereby relieving them from matters entirely incompatible, there is nothing enacted which denies either the power to locate by agent, or by actual assignment of the right itself, at the option of the donee.

"Nothing is needed but a carefully considered manual of instructions in aid of the right, to give it full effect, with ample protection to the government and the individual. The method is sufficiently indicated in my predecessor's report already cited. * *

"The peculiar condition of these claims, under conflicting decisions, presents a feature calling for the most equitable construction of the act. From August 5, 1874, till May 17, 1876, the applicant was excused by direct circular instructions, from personal attendance at the district office, and a large number of applications were thus legitimately thrown into the hands of attorneys and agents. Many of them were, in effect, assigned by means of a power to sell additional to a power to locate, and thus became marketable property under cover of an assumed agency. Large sums of money have been paid for these claims under this system of transfer, and the soldier has received a money consideration, deemed by him of greater value than the right of entry he possessed.

"Very few, if any, complaints have reached this office alleging imposition upon the assignors, or want of sufficient consideration for the sale or power granted. On the contrary, all parties have joined in the request that the transactions might receive the sanction of the department. But, under the decision of May last, they are compelled to stand in the

position of repudiators of the contracts recognized, permissively at least, previous to that time, and conforming in all essential features to the published regulations.

"These are serious results, and affect injuriously, not merely the individuals concerned, but great business interests, which are made to suffer by tying up capital invested in these claims, and locking the wheels of enterprise in whole neighborhoods."

Upon consideration of this report, and moved undoubtedly thereby, the secretary, March 10, 1877, modified his prior order, recognized the transactions theretofore had by means of the powers of attorney, extended this use of them to future cases, and provided a method of certifying these rights and putting them into the business world with an official endorsement. In this circular (Copp, p. 478), the secretary said:

"I have considered your report of the 17th ultimo in relation to soldiers' additional homestead entries, and *in view of the facts therein stated*, I have determined to modify my decision of May 17, 1876, so as to permit entries to be made in the following cases, viz:

"1st: Those presented prior to the order of March 20, 1876, suspending all entries of this kind, and rejected for reasons insufficient in law to bar their reception, but kept alive by appeal, which by such rejection were postponed beyond the date of the order and so lost;

"2nd: Those actually in the hands of agents or attorneys at the date of promulgation of your instructions of May 22d, last, in execution of my decision of the 17th of the same month, which, under said instruction, have not been recognized, and which still remain in the hands of such agents or attorneys, and

"3rd: To allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim has been presented to you and certified as valid, and that the party is entitled to the amount of land claimed under such instructions and regulations as you may prescribe."

The intent of the secretary in this modification is perfectly plain. He was dealing with the situation presented by the commissioner's report. He was thereby fully and officially advised that the right had been treated by the public as property subject to sale; that such sales had been made by means of these powers of attorney used at time of entry by the appointee or agent, really the assignee, and that to discontinue that practice would rob the right in the hands of the soldier of much of its value and disturb vast business interests. With this situation thus graphically presented by the report before him, the secretary, as expressly declared, "in view of the facts therein stated," authorized a continued use of these powers, extended the practice to future cases, and actually provided a species of scrip to evidence and show the right. All this could only have been done for one purpose, viz., to recognize as valid all past transactions of the character described, and, for the future, to additionally secure the public in similar transfers.

Thereupon commenced the certification of these rights and their transfer and sale by means of powers of attorney. The public took the government at its word, and, upon the faith and credit of these instructions and official certificates, declared to be good in the hands of the so-called agents and attorneys, invested vast sums of money in their purchase, located with them farms, villages and town sites, and held others for use as the necessities of the future arose.

This practice, uninterrupted by a single adverse decision, ruling, instruction or intimation from the Land Department, continued to the 13th day of February, 1883, a period of nearly six full years. During all that time the legal status of these certificates was

never doubted; hundreds of them were thus issued, located and patented, and no one ever dreamed that the government, at any future day, would for a moment entertain the idea of repudiating them. Nor has it ever done so.

On the 13th day of February, 1883, (1 L. D., p. 654) further certification of these rights was discontinued. By circular of that date, signed by the commissioner and approved by the secretary, it was declared that the right was personal, not assignable, could only be exercised by the soldier in his own proper person, and that no more certificates would be issued.

Recognizing, however, to its fullest extent the obligation of the government in respect to the certificates issued under the former practice, as well as the rights of those who had taken any form of assignment of the additional homesteads, the secretary prescribed that thereafter the soldier, in making his additional entry, should present himself at the land office and show, *inter alia*, by his affidavit,

"Third. That he has not in any manner previously exercised his additional right either by entry or application, *or by sale, transfer, or power of attorney, but that the same remains in him unimpaired.*"

He, also, expressly excepted from the operation of the new order all certificates then outstanding, and all applications for certificates then pending in the General Land Office, as follows:

"*These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883.*"

The status of these certificates and the rights of holders thereof, thus recognized and protected by the circular instructions of the department were thereafter secured by the departmental adjudications.

We have followed the history of these additional rights thus far for the purpose of demonstrating that counsel for plaintiff in error are incorrect in their statement that the position and rulings of the General Land Office upon this subject have been uniform from the beginning.

We do not care to take the time and space necessary to quote and discuss the decisions, for, whether the decisions of the Land Department be one way or another as regards the construction of the additional homestead law, this court will construe that law according to its true intent and meaning. While the decisions of the Land Department, within the sphere of its jurisdiction, and upon questions of fact properly coming before it for determination, are conclusive upon courts, the courts are not concluded by any decision made by the Land Department touching *the construction of the laws* relating to the subject matter of those decisions. This court has so declared in an unbroken line of opinions, extending from the case of *Wilcox vs. Jackson* (13 Peters, 498), decided in 1839, down to the case of the *Wisconsin Central Railroad Co. vs. Forsythe* (15 Sup. Court Rep. 1020), decided June 3d, 1895.

In the *Wilcox Case*, which was an action for ejectment, and involved the question of where the legal title lay under a decision of the register and receiver of the local land office, *Mr. Justice* BARBOUR, delivering the opinion of the court, said :

"Before we proceed to enquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render the inquiry wholly unavailing. It is this: that the acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims to the right of preemption—that upon these questions they act judi-

cially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al. vs. Peirsol et al.* (1 Peters, 340), in these words: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.' Now, to apply this. Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet, if they undertake to grant pre-emptions in land in which the law says they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case beyond that sum."

In *United States vs. Dickson*, 15 Peters, 141, in a suit brought against the defendant in error and the surties upon his bond, to recover certain sums of public money received by him as receiver of public moneys for the Choctaw district, and which he had refused to pay over, it became necessary to construe the act of April 20, 1818, respecting the compensation of such an officer. The officers of the Treasury Department had for many years placed a construction upon the act contrary to that asserted by the

defendant in error. In the course of his opinion in this court, *Mr. Justice* STORY, at page 161, said:

"It has been also argued that the uniform construction given to the act of 1818 ever since its passage, by the Treasury Department, has been that the act has reference to the fiscal year. The construction so given by the Treasury Department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to laws by any department of the executive government, is necessarily *ex-parte*, without the benefit of an opposing argument, in a suit where the very matter is in controversy; and, when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers, deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance, that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity, when there is no choice but obedience, as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

Cunningham vs. Ashley, 14 How., 377, involved a dispute between rival claimants to certain preemption lands. The officers in the land office at Little Rock had permitted entries to be made, under which the defendant in error claimed, which Cunningham insisted were unauthorized. The Supreme court overruled the decision of those officers, and of the General Land Office, and said that while the officers at Washington may have been misled by the

representations made to them, yet the officers of the government are the agents of the law; they cannot act beyond its provisions nor make compromises not sanctioned by it. And, although the patent had been issued to the grantor of the defendant in error, the decision of the state court was reversed as well as that of the General Land Office.

In the case of *Garland vs. Wynn*, 20 How., 6, the court said:

"The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys vs. Vasse, 1 Peters, 212,* and the case before us belongs to the same class of *ex-parte* proceedings; nor do the regulations of the commissioner of the General Land Office, whereby a party may be held to prove his better claim, entirely oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

Lindsey vs. Hawes, 67 U. S., 554, was a case bringing into question the validity of the determination of the officers of the land office at Dixon, Illinois, allowing Hawes a pre-emption. The decision was approved by the commissioner of the General Land Office.

Mr. Justice MILLER delivered the opinion of the court, in the course of which he remarked:

"It is claimed by counsel of Hawes that this action of the land officers, including that of the commissioner, was a conclusive and final adjudication of the matters now set up in plaintiff's bill, and that the courts of law cannot go behind these proceedings to correct any injustice which may have been done to plaintiff. The proposition as thus broadly stated, and as necessarily so stated by defendant's counsel to avail him in this case, cannot be conceded."

After reviewing the facts in the case, he continued:

"Under these circumstances we have no hesitation in holding that the action of the officers of the Land Office was not conclusive upon their rights, and that a court of equity may inquire into the proceedings by which the title was vested in Hawes and afford relief if a proper cause for it is shown to exist. That this is the settled doctrine of this court a reference to a few of its decisions will show."

Justice MILLER then reviewed some of the decisions to which we have referred and concluded his consideration of that branch of the case by saying:

"We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by defendants on this branch of the case."

Minnesota vs. Batchelder, 1 Wall., 109, came before this court on a writ of error to the Supreme court of Minnesota, in a suit brought by the state of Minnesota against the defendant to recover possession of a portion of section 36, a school section. The defendant set up pre-emption certificates and patents for the land. The plaintiff claimed that these were not conclusive, but the state court refused to permit the question of the proper issuance of the patents to be submitted to the jury upon the ground that the decision of the register and receiver of the local land office was conclusive upon that court and not revisable or to be inquired into.

This court said:

"These questions have been so often before this court and were so fully considered in the last case, *Lindsey vs. Hawes*, where the authorities are collected, that it would be a waste of time to re-examine them.

"A court of equity will look into the proceedings before the register and receiver, and even into those

of the land office or other offices where the right of property of the party is involved, and correct errors of law or of fact to his prejudice."

Notwithstanding the position taken in the cases theretofore decided upon this subject, this court, in the case of *Johnson vs. Towsley*, 13 Wall., 72, again took up the question and again affirmed the rule in language which has since been frequently quoted and approved.

Mr. Justice MILLER, adverting to the contention of counsel that the action of the Land Department is conclusive in respect of the rights of the parties not only in the Land Department but in the courts and everywhere else, said:

"This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and, the question being pressed upon our attention with an earnestness and fullness of argument which it has not, perhaps, before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject."

After reference to many authorities:

"This court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them, they, *by misconstruction of the law*, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. * * This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in

reference to the proceedings before the officers entrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the Acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

In the later case of *Shepley vs. Cowan*, 91 U. S., 340, *Mr. Justice* FIELD, speaking for the court, said:

"The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. *If they err in the construction of the law applicable to any case*, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy resides between private parties, founded upon their decisions."

In Moore v. Robbins, 96 U. S., 530, this language of *Mr. Justice* FIELD was quoted and approved.

In the case of *Rector vs. Gibson*, 111 U. S., 276, *Mr. Justice* FIELD, again writing the opinion, said:

"On matters depending upon conflicting evidence, as to the extent of occupation and value of improvements, and many other matters, the action of the

commissioner is undoubtedly final; *but upon the construction of the law, and particularly as to the party for whose benefit it is designed*, it is subject equally with all local boards of limited jurisdiction to have its conclusions, if erroneous, reviewed and corrected by the judicial tribunals. This question was very fully and thoughtfully considered in *Johnson vs. Towsley*. * * This case is a leading one in this branch of the law and has been uniformly followed. The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the Land Department, that when the legal title has passed from the United States to one party, when in equity and good conscience and by the laws of Congress it ought to go to another, the court of equity will convert the holder into a trustee for the true owner and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of the proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, *because of its misconstruction by those officers*, be deprived of their rights."

The case of *Railway Co. vs. Forsythe*, *supra*, which we believe, is the last announcement of this court upon the subject, dismissed the matter with this brief allusion:

"But, further, it is urged that this question of title has been determined in the Land Department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but *upon the construction of the law;* and such matter, as we have repeatedly held, is not concluded by the decisions of the Land Department."

It is in view of these decisions that we have not deemed it necessary to attempt to explain or reconcile or distinguish the various decisions of the Land Department, referred to in the brief for the plaintiff in error, which have assumed to pass upon the question of the assignability of these additional homestead rights. If, under the law, these rights are assignable, the decisions of the Land Department to the contrary are

immaterial and will not influence this court. If, on the other hand, it was intended by the Congress, in enacting the laws to which we have referred, to prohibit the assignment of the soldiers' right to additional homesteads, this court will arrive at that conclusion by its own independent examination and interpretation of the congressional acts and not by reason of the decisions of the land office.

The important question is presented in this case as to whether or not the gratuity which the Congress gave to honorably discharged soldiers was intended to be of benefit to them in fact, or only nominally. If the construction of the laws extending the congressional gift which the plaintiff in error contends for, be held correct, it seems to us that it can only be done by a repudiation of all those rules which have been applied by this court in the past to similar statutes. Had it been the intention of the Congress to restrict and prohibit the right of assignment or alienation of the additional homestead, it was easily possible to have made that intention apparent by express language; in the absence of such language, and in an appreciation of the futility of the pretended gift if it were unassignable, thus destroying the apparent purpose of the legislation and placing the Congress in the attitude of trifling with the honorably discharged soldiers, we respectfully submit that the contention of the defendants in error should be upheld, and the decision of the Supreme court of the state of Minnesota should be affirmed.

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CORDENIO A. SEVERANCE,
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Counsel for Defendants in Error.

SUPREME COURT.

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 161.

ALFRED F. WEBSTER,
Plaintiff in Error.

vs.

MILO J. LUTHER AND LOUIS ROUCHLEAU,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief for Defendants in Error.

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DULUTH:
PRESS OF G. A. SEIPEL.
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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF THE CASE.

In 1880, Mary A. Robertson, executed and delivered a power of attorney containing, among other provisions, the following, to-wit:

"Know all men by these presents, that I, Mary A. Robertson of the county of Benton, State of Missouri, do hereby make, constitute and appoint James A. Boggs my true and lawful attorney, hereby authorizing and empowering my said attorney to sell upon such terms as to him shall seem meet, any

lands which I now own, either in law or equity and obtained by me as an "Additional Homestead," under the provisions of section 2306 of the Revised Statutes of the United States, and to sell any such lands as I may hereafter acquire under said acts, and to receive the purchase money, or other consideration therefor, and upon such sale to make, sign, seal and deliver in my name all such deeds or other assurances in the law therefor, as to him shall seem meet and necessary." (See page 14 of Record).

On April 7th, 1887, the land involved in this action was entered by Mary A. Robertson under the provisions of Section 2306 of the Revised Statutes of the United States. (See Exhibit "A," page 10 of Record.)

On the same day Mary A. Robertson, by her attorney in fact, James A. Boggs, conveyed said land to defendants in error, Luther and Rouchleau, with covenants of warranty, and the conveyance therefor was recorded in the office of the Register of Deeds, for St. Louis County, on April 15th, 1887. (See page 15 to page 18, inclusive, of Record.)

The land was patented to Mary A. Robertson, September 21st, 1888, upon her application under Section 2306 of the Revised Statutes of the United States. (See patent commencing on page 11 of Record, and application to enter on page 10 of Record.)

On October 17th, 1890, Mary A. Robertson executed a quit claim deed to plaintiff in error, upon which plaintiff in error bases his claim to the land. Upon this statement of facts the District Court of St. Louis County, Minnesota, decided that defendants in error were the owners of the land in question, and that plaintiff in error had no title to or interest in the same, and judgment was entered accordingly. (See

judgment of the District Court, page 24 of Record.) This decision was affirmed by the Supreme Court of the State of Minnesota. (See judgment of the Supreme Court. page 28 of Record.)

ARGUMENT.

I.

It is claimed that the letter of attorney in question is invalid. It is somewhat difficult to gather, from the objection of plaintiff in error to the introduction of this instrument in evidence (see bottom of page 13 of Record) on just what ground this claim is based. Counsel contents himself with the simple assertion that the instrument is in *contravention of the laws of the United States*, and against *public policy*, without specifying what law or laws of the United States it *contravenes* or *how* it is against public policy. How this instrument can be held to be against public policy, in the absence of restrictive or prohibitory legislation, is not apparent. Mary A. Robertson, in executing a power of attorney authorizing a conveyance of land to be acquired thereafter by her, did nothing in itself wrong or against public policy. Modern public policy favors the theory that a man may do what he chooses with that which is his own, unhampered by restrictions and hindrances. This, then, is not a question of public policy, but a question of *statute law*. This instrument is valid, unless it is rendered invalid by some law of the United States, *i. e.* unless its execution is prohibited or forbidden by some provision of law. The burden is upon plaintiff in error to demonstrate its invalidity. All the presumptions are in favor of its validity. In the case of Knight vs. Leary, 54 Wis., 459, the Court, in reference to a claim that the alienation was contrary to the spirit of the law,

uses this language: "Without entering into an extended discussion of the subject, it is sufficient to say that the law does not favor restrictions upon alienation, and nothing short of a positive provision to that effect will justify a court in holding that the statute imposes such restrictions." Townsend vs. Fenton, 30 Minn., 528, is to the same effect. What provision of the law did Mary A. Robertson violate in executing this instrument, which made James A. Boggs her agent to convey real estate that she might thereafter acquire? A great many cases are cited in the brief of plaintiff in error, which merely involve a construction of the pre-emption laws of the United States, but as there is no pretence that the land involved in this suit was entered under the pre-emption laws, of course these cases have no application to the case at bar. With two exceptions, the other common law cases cited merely involve a construction of the Homestead Laws of the United States, *i. e.* a construction of "an act to secure homesteads to actual settlers on the public domain," approved May 20th, 1862. (See Statutes at large of the United States, Vol. 12, chapter 75, of laws 1862.) As the land involved in this suit was not entered under this act, in our view, these cases have no application to the case at bar. But as it seems to be claimed that this land was entered under this act, let us examine it.

Section two of said act provides that any person applying for the benefit of the act, shall, among other things, make an affidavit that such application is made for his or her exclusive use and benefit; that said entry is made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person. This section also provides that no certificate shall be given or patent issued until the expiration of five

years from the date of entry, and also requires the applicant to make affidavit, at the time of receiving the final certificate; that no part of the same has been alienated.

Nowhere in this act is alienation prior to final receipt or certificate directly forbidden. And the only basis for the decisions by the courts that a person acquiring lands thereunder, may not alieniate the same prior to the obtaining the final certificate, is the requirement of these affidavits by the law.

Townsend vs. Fenton, 30 Minn. 528.
Anderson vs. Carkins, 135 U. S. 483.

But the simple fact is that the land in question was not entered under what is commonly known as the United States Homestead Act, *i. e.*, the act of May 20th, 1862, and it follows as a consequence that none of the restrictions of that act can be said to have been violated by the execution of the instrument. The land in question was entered under Section 2 of the act of April 4th, 1872, as amended by act of June 8th, 1872, as amended by act of March 3rd, 1873. (These several acts are to be found in U. S. Stat. at Large, Vol. 17, on pages 49, 333 and 605, respectively.)

So much of Section 1 of said act as it is necessary to consider here is as follows:

"That every private soldier and officer * * * * shall, *on compliance with the provisions of an act entitled: "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, as hereinafter modified*, be entitled to enter upon and receive patents for a quantity of public land (not mineral) not exceeding one hundred and sixty acres, or one quarter section * * * * Provided that said homestead settler shall be allowed six months after locating his

homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement. And provided also, that the time which the homestead settler shall have served in the army, navy or marine corps aforesaid shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the time of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length or time he may have served. Provided, however, that no patent shall issue to any homestead settler, who has not resided upon, improved and cultivated his said homestead for a period of at least one year after he shall commence his improvements as aforesaid."

Section two of said act when amended as above stated is as follows:

"Sec. 2. That any person entitled under the provisions of the foregoing section to enter a *homestead*, who may have heretotore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much as, when added to the quantity previously entered shall not exceed one hundred and sixty acres."

It seems strange that it should be clained that this act is any part of the act of May 20th, 1862. That it is no part of that act is evidenced by the fact that it refers to the act of May 20th, 1862, as something *outside of itself*. The whole tenor and effect of the first section of this act is to relieve certain persons, *i. e.* soldiers, sailors, etc., when entering land under the act of May 20th, 1862, of some of the burdens imposed by that act, viz: allowing the period of their service in army or navy, to be deducted from

the period of residence and cultivation required by that act, and not requiring them to enter upon and commence settlement and cultivation tion until six months after filing. But any person seeking the benefit of this section is expressly required by this act to comply with the provisions of the act of May 20th, 1862.

That is, the land must be entered under the act of May 20th, 1862, and the requirements of that act as to the settlement, cultivation and resi lence must be complied with, and the affidavits required by that act must be made. A person seeking the benefit of the second section of this act is not required to comply with the provisions of the act of May 20th, 1862. That a person seeking the benefit of the first section of this act was required by express provision to comply with the provisions of the act of May 20th, 1862, and a person seeking the benefits of the second sections thereof was not so required, makes it plain that congress never intended that a person entering land under the second section of said act should be re-required to attempt to comply with the provisions of the act of 1862. The expression of the requirements in the one instance excludes the idea of the requirements in the other.

Land taken under this section is in no sense a homestead. It is land taken in addition to a homestead previously taken. To call it a homestead is a misnomer. In theory of law, the person entering land under this section is residing upon the homestead previously taken by him. The land entered under this section had been completely earned by the person entering it, by his residence on, and cultivation of the nomestead previously taken.

A good way to look at this section two, is to ask the question: What ought a person entering land

under it to be required to prove before the Land Office in order to be entitled to enter it? We insist that he would only have to prove:

1st. That he was a soldier in the rebellion; had served more than ninety days; was honorably discharged, and had remained loyal to the goverement.

2nd. That he had, prior to April, 1872, taken a homestead of less than 160 acres of land.

Could the soldier legally be required to prove more? We say not. To require anything further of a soldier seeking to enter land under this section, would be to require something not required by the law, and would be a gross imposition upon the soldier.

This act being no part of the homestead act of 1862, and a person seeking the benefit of the second section of the act not being expressly required to comply with the provisions of said act of 1862, it follows that a person entering land under this section is not required by law to make either of the affidavits required by the act of 1862, and the reason for the rule that a homesteader cannot alienate his homestead before final certificate issues, does not exist as to a person entering land under said second section.

But counsel says the Department of the Interior required the person applying to enter land under this section to make affidavit that the entry was made for his own exclusive benefit, and for the use and benefit of no other person whatsoever, and he cites circulars of the land commissioner to that effect.

Even the counsel does not have the temerity to claim that the law required the person applying to make this affidavit, or any affidavit of like tenor. This circular ought to be preserved as an example of the judicial acumen of a non-judicial department of

the government. We have yet to learn that the Department of the Interior has legislative powers. We have certainly never supposed that it had the power either to alter or amend the laws of the United States, or to impose conditions upon persons entering land that were not imposed by the law. The requirements of this affidavit of the applicant by the department, is a blundering and unwarranted attempt at legislation on the part of the department.

If this affidavit was not required by the law, the fact that the department attempted to *construe or legislate* the requirement of it into the law, will not make the requirement part of the law.

But what affidavit did the department require? It is neither the one nor the other of the affidavits required by the law of 1862. It is an affidavit conjured up by the department. It seems to have been pruned out of the first affidavit required by the law of 1862. Why was he not required to make both affidavits provided for in that law? Who gave the department the right to sort out what provisions of that law should be complied with and what not? The very impracticability of a person entering land under this section complying with the provisions of the law of 1862 indicates that it was not intended that he should. Had congress intended that a person entering land under this section should make an affidavit, would they not have made that intention appear, and would they not have prescribed the substance of the affidavit? Counsel's theory must be that because a blundering department required a person entering land to make an affidavit, which was unknown to the requirements of the law, to the effect that he had not alienated, that therefore congress intended to restrain alienation until after final certificate.

II.

There is nothing in common between the homestead law of 1862 and the second section of the act of 1872.

Thomas H. Benton, who was among the first, if not the first, to advocate a homestead law, in his advocacy thereof laid down the proposition that it would be more advantageous to the union to give public land to actual settlers, thereby populating the new states, than to sell the same to speculators, claiming that the government would receive more in taxes from the several settlers in a few years than the nominal price which the speculators would pay for the land. The underlaying purpose and intention of the act of May 20th, 1862, is to give to *actual settlers* homes, and the restraints were placed upon alienation in that act for the purpose of preventing land from being acquired under the same by any person other than *actual settlers*.

Let us consider the second section of the act of 1872, in comparison of the act of 1862. Before the passage of the act of 1872, a soldier could take a homestead under the act of 1862 in the same manner as any other actual settler, but was limited, in common with any other entryman under this act, to eighty acres if he made his entry upon lands situated within railroad limits. The act of 1872 gave to soldiers the right to take homesteads of one hundred and sixty acres, either inside or outside of railroad limits. It quite naturally occurred to the person who drew the act of 1872 that it was an injustice to those soldiers who had taken homesteads previous to the passage of the act in railroad limits to permit those who should take homesteads subsequent to the passage of said act to have one hundred and sixty acres

inside of railroad limits. Hence the second section was incorporated into said act. Its manifest object being to put those who had taken homesteads before the passage of this act in railroad limits, as nearly as practicable, on equal footing with those who should thereafter enter homesteads in railroad limits.

It was impossible to place them exactly upon equal footing for the reason that very few of those who had previously taken eighty acre homesteads would be able to enter the additional eighty acres contiguous, or within miles of, that homestead.

With a view of compensating those soldiers who had taken homesteads of less than one hundred and sixty acres prior to the passage of the act, and putting them as nearly as possible on an equal footing with those who might enter one hundred and sixty acres as a homestead in the future, it was provided in the second section that they might enter so much land as their homestead was less than one hundred and sixty acres. It will thus be seen that it was not contemplated that a person who entered land under this section should be an *actual settler*. In the very nature of things he could not be an *actual settler*, for in theory of law, as we have mentioned before, he is residing upon the homestead previously taken. It is apparent that none of the reasons for the restraints upon alienation contained in the homestead act of 1862, exist as to section 2 in the act of 1872.

But there are reasons why these restraints should not exist as to lands entered under this section. The land entered under this section is a mere gratuity or bounty given to soldiers of a certain class, to compensate them for the fact that they were only permitted to enter a homestead of eighty acres, while other soldiers were permitted to enter one hundred and sixty acres as a homestead. Manifestly a large

number of these soldiers were not in a position to reap any advantage of the right given them, unless they were allowed considerable latitude in the exercise of it.

Is it reasonable to suppose that congress would give them this right as a compensation and then surround its exercise with such restrictions as to prevent a great number of them from reaping any advantage from it?

Is it not more probable that congress intended to treat soldiers of this class as sensible men and not as imbeciles, and intended that they should exercise this right in such a manner as in their judgment would enable them to derive the greatest benefit therefrom?

In all probability a great number of these soldiers were residing at a great distance from any public lands that were subject to entry. It is safe to say that more than one-half of the soldiers of this class were so situated that they could derive no benefit from the right conferred upon them by this section unless they could exercise it through others.

In nine cases out of ten the person entering land under this section would reside at so great a distance from the land entered that it would be impossible for him to reap the benefit from the land by means of cultivating the same. It must have been contemplated by congress that the only manner in which such entryman could enjoy any benefit from the act, would be by selling the land entered, for it is a matter of common knowledge that in a country where there is government land to be entered, no rental could be derived from the land. Hence congress must have intended that the entryman should be left entirely free to dispose of, or alienate the land entered,

in such manner as in his judgment would be most for his interest.

If a person entitled under this section should be of the opinion that it would be most for his advantage to sell, or contract to sell, the land to be entered prior to entry, and he does so, is there anything in this act that he violates thereby?

What provision of the act forbids him to do so? We challenge counsel to point out a single restriction upon the alienation or disposition of land so entered contained in the act of 1872.

In the absence of positive restriction or prohibition, the entryman could as well negotiate the sale of the land before as after entry. Our position then is:

1st. That section 2 of the act of 1872 is no part of the act of 1862, and that therefore the restrictions upon alienation, prior to the final certificate contained in the act of 1862, have no application to lands entered under the second section of the act of 1872.

2nd. That it appears affirmatively from the act of 1872 that the restrictions upon alienation contained in the act of 1862 were not to apply to lands entered under section 2 of that act.

3rd. That there are no restrictions upon the alienation or disposition of lands entered under said section contained in the said act of 1872.

It follows as an inevitable conclusion, that Mary A Robertson, in executing the power of attorney mentioned herein, violated no provisions of the laws of the United States, and in so doing did nothing either against good morals or public policy and that the power to sell and convey contained in said instrument is legal and valid, and that the con-

veyances made pursuant thereto, passed a good title to defendants in error.

III.

But counsel says that the right to enter land under this section is a *personal one*. We submit that to say the right is a personal one; does not necessarily mean anything. Most rights are *personal* rights. There is no "magic" in this word personal. No doubt that the right is personal in the sense that all rights are personal and in the sense that it was intended to recoup persons of a certain class for a disadvantage that had been put upon them by a previous law. Perhaps it may also be conceded that the right is personal in the sense that the land would have to be entered in the name of the person entitled, by himself in person or by his agents. But conceding this to be true, it by no means follows that the person entitled could not contract to sell the same before entry, or execute a power of attorney before entry, authorizing the attorney to convey the land after entry.

Dole vs. Wilson, 20 Minn., 308 (356).

Doe vs. Wilson, 23 How., (U. S.) 457.

The fundamental error, which underlies and permeates the whole of the reasoning of the counsel for plaintiff in error and of the decisions of the Interior Department, consists of the assumption that a person entering land under the act of 1862, may not alienate or agree to alienate it before final entry, because the right to enter is *personal*. This is a false assumption and a misconception of the statute. The basis of the restrictions upon alienation contained in the act of 1862 is the positive provisions therein contained, requiring affidavit of residence, cultivation, and non-alienation at the time of final entry, and is not the mere fact that the right to enter is a personal right.

This error vitiates the reasoning of counsel for plaintiff in error. To say that the right to enter land under this act is personal, is simply to say that the soldier *alone* has a right to enter the land. It does not follow from the fact that the soldier alone has the right to enter land under the act, that he may not contract with reference to or convey land that he contemplates entering under the act before such entry. It is certain that he can if not prohibited, and the above cases so hold. And yet this non-sequitur is an essential part of the fabric of argument which counsel has constructed.

IV.

AUTHORITIES OF DEFENDANTS IN ERROR.

It is believed that the question before the court is merely a question of statutory construction, and that the statute in question is in itself sufficient to convince the court that the instrument in question is free from any taint of illegality, and that the decision must be in favor of the defendants in error upon this question without regard to authorities.

The following authorities are cited by the defendants in error in the belief that they sustain the construction of this statute for which they are contending.

Mullen vs. Wine, 26 Fed. Rep., 206.
Rose vs. Lumber Co., 73 Cal., 385.
Knight vs. Leary, 54 Wis., 459.
Webster vs. Luther, 50 Minn., 77.
Montgomery vs. Land Bureau, 94 Cal, 284.
Montague vs. McCarroll, 36 Pacific Rep., 50.
Poirier vs. Barnes, 57 Fed. Rep., 956.
Same case on Appeal, 64 Fed. Rep., 14.

In the case of Mullen vs. Wine, the court says: "The pertinent facts for the opinion I express are

these: Under the act of congress, dated June 8th, 1872, entitled 'An act to amend an act relating to soldiers' and sailors' homesteads,' Lucy Phillips and Hattie Phillips, minor children of William Phillips, deceased, were entitled to locate and enter eighty acres of public lands as an additional homestead. They resided in Minnesota, and their guardian sold this right, and received full pay therefor.

"Plaintiff claims under a location and title made in pursuance of this sale. After the sale of this right, and location and entry, (which was in the name of the minors), defendant acquired his deed and title from them."

Again the court says:

"There are really but two questions in the case. First: Was this right to locate and enter personal property? Second: Was it assignable?" And the court answered both of these questions in the affirmative.

So much of this decision as is pertinent to the question of statutory construction which is before the court is in the following language:

"The right to sell property need not in terms be granted; it exists if it is not in terms withheld. To preserve the Indian title an express restriction is inserted in the patent. The same or something equivalent is always necessary to stay the power of disposal which attends the ownership of the property. When this right has been exercised, the location and entry made, who will doubt the right to sell the land? *Yet why should the right exist after, and not before? Congress has placed no restriction. Who may?*

"It must be borne in mind that this is not a case in which there is to be future consideration or

future duty. It is personal, in that they of a certain class can avail themselves of the gift.

"It is not personal in the sense that *future services or future conditions are imposed.* Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts simply to this: In view of what has been done, congress makes this gift. *It places no restriction on the donee, but leaves him to use the gift as he sees fit.* Why may he not sell it? I see no satisfactory reason to the contrary.

"Hence I answer the questions in the affirmative. Decree will be entered in favor of the complainant."

It will be seen upon an examination of this case that Judge Brewer goes farther in his decision than it is necessary for this court to go in order to decide the case at bar in favor of defendants in error. He holds that right to enter land under this section is personal property, and that therefore the guardian can sell it without a license from the Probate Court, and that being personal property, it has all the qualities of assignability that other personal property has.

It is not necessary for defendants in error in this case to claim that the right to enter land under this section is personal property. All that it is necessary for them to claim is that Mary A. Robertson was not restrained or prevented by any provision of law from making the power of attorney in question prior to the entry of the land, and that consequently this instrument is legal and valid. Certainly the decision of of Judge Brewer is an adjudication by the United States Court to the effect that Congress has placed no restriction upon the person entering land under

this section which would prevent such person from making such an instrument as the one in question prior to entry. The whole of the reasoning of Judge Brewer in this decision sustains the construction of the statute for which appellees are contending.

The case of Rose vs. Wood Lumber Co. above, is practically on all fours with the case at bar. The facts in that case were substantially as follows:

On the 22nd day of March, 1880, one Benjamin D. Gano, executed and delivered to one D. H. Talbot a power of attorney, with the right of substitution, authorizing him or his appointee to locate and enter at the United States Land Office the additional homestead to which Gano was entitled under section 2,306 of the United States Revised Statutes, and to sell and convey the same. On the 9th day of June, 1880, Talbot substituted as attorney for Gano, one A. L. Comba, by whom the deed to plaintiff was executed on the 13th of May, 1883.

To the introduction in evidence of the power of attorney and deed, the defendants objected upon the same ground as the Court will see, upon which the plaintiff in error in this action objected to the introduction of the power of attorney.

The Court in its decision says:

"The patent of plaintiff's grantor was issued under the provision of section 2,306, Revised Statutes of the United States.

This section was a part of the act of congress passed April 4th, 1872, and is entirely independent of the other sections of chapter 5, among which it is placed. Unlike our code, the revised statutes of the United States are not to be read in one act, it being expressly provided that the arrangement and classi-

fication of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed. (U. S. Rev. Stat., Sec. 5600.)"

Again the court states:

"Assuming the irrevocable power of attorney from Gano and wife to be as claimed by appellant, an assignment of the applicant's right to the land, and of Gano's right to his additional homestead, still we *find nothing in the statute referred to which would authorize us in holding such power* of attorney to be null and void.

"As stated before, section 2,306 is independent of the other sections of chapter 5, and in the absence of an express prohibition against alienation of the property by the claimant, after the issuance of a certificate from the general land office to locate, in person or by agent, a certain number of acres, we cannot say that the right of alienation does not exist. *It is a right which need not in terms be granted* by the sovereign authority, for it exists, if not expressly prohibited or opposed to public policy.

"The location and entry were made in the name of Gano, the beneficiary of the act. *Congress has not said that the right to sell should not exist before actual entry, nor has it required any* occupation, consideration, or duty of any kind, as a condition precedent.

"*In all cases where it has been the intention of congress to prevent alienation by the beneficiary, such intention has been clearly expressed.*"

The facts in the case of Knight vs. Leary, above,

are substantially identical with the facts of the case at bar.

The court says:

"The plaintiff's claim of the title is founded upon the following facts: January 10th, 1878, one John Nance executed to Charles D. Gilmore a power of attorney, irrevocable, authorizing the latter to locate the additional homestead of Nance, under certain acts of Congress, on the land in controversy, and to sell and convey the same for such sum as he might deem proper, and to execute deeds therefor in the name of Nance and wife, with or without covenants of warranty. The instrument also contained the usual power of substitution.

"By a writing indorsed on such power of attorney, and dated March 13, 1878, Gilmore substituted Wendal A. Anderson in his place to execute the intendments of such instrument. On May 3rd, 1878, Nance and wife, by Anderson, as their attorney in fact, conveyed the lands in controversy to the plaintiff by deeds of warranty, containing all of the usual covenants.

"January 29, 1879, the United States patented the land to Nance."

It is sufficient to say of this decision that the Supreme Court of the state of Wisconsin therein sustained the title of plaintiff, based upon the foregoing facts; thus, in effect, holding that the power of attorney therein mentioned was valid, and not violative of any provision of law or against public policy.

It is not necessary to consider the other cases cited above in detail. It is sufficient to say that they are directly in point and fully sustain the position contended for by defendants in error are:

V.

AUTHORITIES OF PLAINTIFFS IN ERROR.

Let us now examine the cases cited by plaintiffs in error.

Plaintiff in error cites a large number of cases, but the Court will find, upon an inspection of them, that the only cases cited that can be claimed to directly sustain plaintiffs in error are

Nichols vs. Council, 51 Ark., page 26.

Macintosh vs. Renton, 2 Wash, 121 and 3 Wash., 436.

Of the case of Nichols vs. Council, it might be said that whatever the court said as to the second section of the act of 1872, is mere dicta, for the reason that it appears clearly, from the opinion of the court, that it did not appear from the record in that case that the land in question was entered under said section.

The most remarkable thing about this decision is its logic.

The reasoning of the court is, in substance, as follows:

1st. (Major premise.) The first section of the act of 1872, expressly requires of those who attempt to take advantage of its terms, a compliance with the provisions of the homestead act of 1862.

2nd. (Minor premise.) A person seeking the benefit of the second section of this act of 1872 is not expressly required to comply with the terms of the act of 1862.

3rd. (Conclusion.) Therefore, a person seeking the benefit of the second section of the act of 1872, is required to comply with the terms of the act of 1862.

We submit that this reasoning is absurd, and

that the conclusion to be drawn from the premises should be exactly the reverse of the conclusions drawn by the Arkansas Court. As an evidence of the care, consideration and research given to this case, both in by the court and the respective attorneys engaged therein, it is well to remark that the case of Knight vs. Leary, above, was decided on March 14, 1882; the case of Mullen vs. Wine, on January 18, 1886; and the case of Rose vs. Wood Lumber Company, on September 15, 1887, and that not one of these cases are cited by the counsel or the court in this case, although it was not decided until after May, 1888.

We think it is evident from this that the Arkansas Supreme Court gave the matter a very meager and careless consideration.

Under these circumstances ought any considerable weight to be attached to this case as authority?

The case of Macintosh vs. Renton is not analogous to the case at bar. The facts out of which it grew were, that Macintosh sold to Renton an amount of what is designated in the decision as Soldier's Additional Homestead Scrip. Renton upon said sale paid a consideration. He subsequently brought suit for the amount paid, upon the grouud of failure of consideration, alleging that the scrip was forged and valueless. It is apparent that an entirely different question was before that Court than the one before this Court, and counsel can hardly claim that this case is a direct authority for the position he is endeavoring to maintain.

It seems to have been practically conceded, in that case, by all parties, that the contract for the sale of the scrip was not valid, and hence a careful consideration was not given, either by the Court or

attorneys, to the statute under consideration in this case. The Court merely saying: (We quote from the last decision.)

"It is not disputed and cannot be, that the soldier himself and he alone can use it, and he cannot sell it, or transfer it in any way to another, and *thereby give to that other the right to make an entry of lands with it.*" The position taken by the Court is not supported by any reasoning of the Court, or by any evidence of a careful and thorough consideration of the statutes in volved.

In our view, at most, it is merely a decision of the Court that the right to enter under this section must be exercised by the soldier, and is not a holding that a soldier may not, prior to entry either execute a contract to convey the lands after entry, or appoint an attorney to convey it after entry.

We are not surprised that the decision of Judge Brewer, in the case of Mullen vs. Wine, should be a source of serious annoyance to counsel for plaintiffs in error. But we are a little surprised that conusel for plaintiff in error should have felt compelled, by the exigency of his cause, to claim that the decision of Justice Brewer in the case of Anderson vs. Carkins, 135 U. S., 483, overrules the decision of Judge Brewer in the case of Mullen vs. Wine.

The decision of Judge Brewer in this case not only does not overrule his decision in the case of Mullen vs. Wine, but, as a matter of fact, it does not conflict with that decision in the slightest degree. The land involved in the case of Anderson vs. Carkins, was entered under the homestead act of May 20, 1862, as modified by the first section of the act of 1872. The Court will remember that a person seeking the benefit of the first section of the act of 1872

is expressly required to comply with the provisions of the act of 1862.

This would include, of course, the making of the affidavits required by the act of 1862, and it follows that land entered under this section will be subject to all of the restraints of alienation contained in the act of 1862. Justice Brewer, in making the decision in Anderson vs. Carkins, evidently had this in mind for he says:

"Section 2304 (a part of section 1 of the act of 1872) makes provisions for *homesteading* by soldiers and officers who served in the army of the United States during the recent war; but *that section* makes no substantial change, except in respect to the time of occupation. Under *this section* Anderson perfected his homestead right; but the question of the length of occupation required to perfect this right, in no manner affects the controversy. The *same affidavits* in respect to alienation are required from Federal soldiers as in other cases of *homesteads*."

The land involved in this suit was entered under section 2 of the act of 1872, which does not require compliance with the provisions of the act of 1862.

Land entered under this section is not a homestead in any sense of the word, as no settlement, occupation or cultivation is required. It will thus be seen that these cases are easily distinguishable, and do not conflict with each other.

DEPARTMENT DECISIONS.

It has not been deemed necessary in this brief to consider in detail the numerous circulars and decisions of the Department of the Interior, cited by the counsel for plaintiff in error. It is believed that

an examination of the statutes in question will convince the court, beyond question, that the requirement by the department of an affidavit on the part of the soldier entering land as an additional to his homestead, has no foundation in the statute, and cannot be justified by any construction of t' e same. If it were a matter of doubtful construction as to whether this affidavit was required by law, of the soldier, perhaps it would be proper to give some weight to the construction placed upon it by the department in requiring it. But as there is utterly no foundation in the statute for the requirement of this affidavit, little or no weight should be attached to the circulars and decisions of the department requiring it.

The Department of the Interior only has jurisdiction of the manner of entering public lands, and has no jurisdiction in connection with the lands after the title has passed from the United States.

The question before this court is merely a question of conveyance of the land after the title to the same has passed from the United States.

No such question ever has been, or in the nature of things, ever can be, before the department for its decision. Hence the decisions of the department are not even precedents upon the question before this court. The department seems to have held that the right to enter land under this section is a personal right, and must be exercised by the soldier in person, or by an agent acting in his behalf. But it never has held that if a soldier entered land under this section, the land would not be bound by any contract he might have made in relation to the same, prior to entry, or that the land might not be conveyed by an attorney in fact, appointed by him prior to entry. The department has no jurisdiction of any such question. But if the court should think that some weight

should be attached to these decisions of the department, certainly very much less weight ought to be attached to them than to the adjudications of the common law courts.

Even if these cases could be held to be in point, as claimed by counsel, and tend to sustain his theory of the case, it is nevertheless true that they are directly in conflict with the decisions of the common law courts, cited by the defendants in error.

Secretary Noble raises a point in regard to the construction of this statute, which has not yet been touched upon in this brief.

He claims that the act of 1872 should be construed as a whole, to which no objection need be made, and calls attention to section 3 of that act, which provided that, in case of the death of any person entitled under the first section of the act, his widow or minor children shall be entitled to the benefits. Conceding that the provisions of section 3 apply to persons entitled under section 2, which would seem to be a little doubtful from the reading of it, we are unable to see how this section in any way militates against the theory of the statute, of defendants in error. For, even though section 3 applies to section 2, the soldier, nevertheless, has the right, at any time during his life to enter the land.

And we fail to see anything in section 3 that evidences any intention on the part of congress that if the soldier, during his life, should determine to enter land, that he might not, prior to his entry, contract to sell the land he intends to enter, or appoint an attorney before entry, with the power to sell and convey the land he intends to enter, after entry.

We do not even see how this section militates against the holding of Judge Brewer, that the mere

right to enter land under section 2 is personal property, for the soldier could not sell more than he had, and what he has is the right to enter land *during his life*.

The personal property then would be the right to enter the land *during the life* of the soldier. And the person who purchased this right would have to enter the land *during the life* of the soldier, or lose all the benefit of his purchase.

VII.

So far defendants in error have argued this cause upon the ground which plaintiff in error seems desirous of placing it, i. e., that this instrument is something more than a mere letter of attorney authorizing James A. Boggs to convey certain designated real estate to be acquired after its execution by Mary A. Robertson. It may be suggested, however, that this instrument is a mere letter of attorney authorizing a conveyance of after acquired property that, as a consequence the conveyance by Boggs would have been legal and valid even though the land had been entered under the act of May 20, 1862. At the time of the conveyance Mary A. Robertson had entered the land and had secured the final certificate and was unquestionably in a position to legally convey the land herself. Certainly what she could do herself she could do by her agent. (See Gilbert vs. Thompson, 14 Minn., 544 (Gil. 414).

This letter of attorney is not not expressly made irrevocable by its terms and contains only a power to convey. Could not Mary A. Robertson at any time have revoked the authority of James A. Boggs to convey the land entered? Is not her failure to revoke the authority of Boggs at the time she entered the land significant? Does not her failure to revoke show

that she intended that the authority to convey should continue in Boggs after entry?

Mark vs. Dickson et al., 20 How. (U. S.) 501.

VIII.

STATUTE OF MINNESOTA.

Counsel feeling very doubtful as to his contention that this power of attorney is invalid under the laws of the United States, seeks to have a strained, unnatural and technical construction placed upon chapter 44, of the Statutes of Minnesota, in order that this power of attorney *may be held invalid.* It becomes necessary therefore to examine this chapter. As a rule, the most reliable guide to the true interpretation or construction of a statute, is a knowledge of the object and purpose of its enactment.

The object and purpose of the enactment of chapter 44 evidently was to simplify and codify the law of "powers" as it previously existed, and to eradicate the technicalties and refinements that have grown up around this subject in the law of England.

This chapter is a chapter of "Powers." By the first section of it, "Powers," except as authorized and provided for in it, are abolished. Does this word powers have any peculiar significance? Let us see. Washburn, in his work on real property, in section 1 of the chapter on "powers," page 589, Vol. 2nd, says:

"Before proceding to consider the law of executory devises, and with it what remains to be distinctively said of springing and shifting uses, it seems proper to treat of another mode of changing and affecting the limitation of estates, which is derived from the statute of uses, and is intimately connected with this last class of uses, and that is by *what are in law called "Powers."* which are methods of causing a use

with its accompanying estate to spring up at the will of a given person."

For other definitions of this word "power" or "powers," see section 5 of this same chapter.

Tiedman, in his work on Real Property, in the chapter on powers, par. 558, in speaking generally of powers, says:

"A power, in the most comprehensive sense in which the word can be used, is an authority conferred upon a person to do a thing. But in its present application it signifies an authority to dispose of property, which is vested in either the person exercising the power, or some other person. Under this latter signification three distinct classes of power will be recognized. First, statutory powers; second, powers of attorney; and third, what are generally called powers of appointment, or simply powers."

Again in para. 559, he says: "The third class of powers enumerated above, is what concerns us at present, viz: Powers of appointment. These powers, which are generally simply known as 'powers,' are modes of disposition of property, which operate under the Statute of Uses or the Statute of Wills. The creation of the power invests in the person to whom it is granted, called the donee, *a present indefeasable executory interest in the land. It is a right to convey the land, and cannot be revoked by the donee.*"

It is thus apparent that the term "powers" has a peculiar legal signification, and does not include powers of attorney which pertain more particularly to the law of agency. This distinction between "powers" proper and powers of attorney is broad and clear.

The donee of a power proper was not the agent of the grantor in any sense. He exercises the power as a matter of right, and in his own name. What he

does he does himself, and not as the mere instrument of a principal. An attorney in fact does nothing himself. Whatever is done is done by his principal, and he is the mere agent or instrument, by means of which his principal acts.

Washburn, after defining powers as above, in section 2 of the same chapter says:

"Powers, as thus applied do not come within the popular meaning of the term when used in reference to acts done by one as the *agent or attorney of another.*"

Tiedman in para. 558 says:

"Powers of attorney are authorities conferred by a principal upon an agent to perform certain acts in the manner indicated in the instrument of authority. *The exercise of this power is the act of the principal, through or by means of the agent.*" That chapter 44 is a mere statement or codification of the law of powers as it previously existed will be made apparent by the comparison of it with the chapter on powers in any work on real property.

It will be found that principle after principle of the text writers are re-stated in this chapter.

For example, Washburn, at page 607, Vol. 2, says:

"Any person who is competent to dispose of his own property, may execute a power." Section 37 of this chapter says: "A power may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands except in the single case mentioned in the next section.

Again, on page 604, he says: "Powers may be created by deed or by will." Section 34 of this chap-

ter says: "A power may be granted, first; by a suitable clause contained in a conveyance of some estate in the lands to which the power relates; second, by devise in a last will and testament."

Other comparisons might be drawn, but it is unnecessary. Section 34 of this chapter is instructive. It shows to a certainty that the scope of this chapter is limited to what Washburn designates as "powers," and Tiedman designates as "powers of appointment, or simply powers." As throwing light upon chapter 44, it is well to look at chapter 43, which is a codification of the law of Uses and Trusts. Uses and Trusts and Powers are kindred subjects of the law and are about equally technical and confusing; and these two chapters are attempts at clearing up these subjects, and are companion pieces."

Powers, as designated by Washburn, are always tangled up with the law of "Uses and Trusts," in fact have their origin in and relate to the "Statute of Uses." Does not the fact that these two subjects are worked up together, as it were, indicate that the word "powers" in chapter 44, is used in the same sense that Washburn gives it? Taking the whole of chapter 44 into consideration, and giving due weight to all its parts and provisions, the conclusion is irrisistable that the word "powers" in the first section of this chapter, is used in its ordinary and usual meaning in law, and does not include powers of attorney. It follows that powers of attorney are not affected in any way by this section, and that, too, without regard to section 60.

But counsel will say chapter 44 defines powers. And so it does. Section two says: "A power is an authority to do some act in relation to lands, or the creation of estates therein, or charges thereon, which

the owner, granting or reserving such power, might lawfully perform."

This section must be construed with reference to all the other provisions of the chapter.

For instance, construe it in connection with section 34, which provides that powers shall be granted by a suitable clause contained in a conveyance of some estate in the land to which the power relates, or by will, and can it be held that the legislature intended powers of attorney to be included within the terms of section two.

Then again a simple attorney in fact cannot do any act in relation to land, create any estates therein, or charges thereon. He is simply the *instrument by means of which the principal does the act or creates the estate or charge.* As Tiedman says in reference to powers, para. 558: "*The exercise of this power is the act of the principal, through, or by means of, the agent.*" It is entirely different with the donee of a power proper. He is not an agent. What he does he does himself. He is not a mere instrument. In our view, then, this power of attorney is not affected by this chapter, aside from section 60. But to make that plainer, which is already plain, *i. e.*, that the chapter was not intended to affect in any way the law or agency or letters of attorney, section 60 was put into the chapter, providing that the provisions of the chapter should not extend to simple letters of attorney, to convey land in the name and for the benefit of the owner. No claim is made by counsel that this letter of attorney is not a simple letter of attorney to convey land in the name of the principal, Mrs. Robertson. But counsel makes the gratuitous assumption that the land was not to be conveyed for the benefit of Mrs. Robertson.

We say that the assumption that Mrs. Robertson

was not to be benefitted by the conveyance, is gratuitous, for the reason that there is not a particle of evidence to that effect. What the entire arrangement between Boggs, the agent, and Mrs. Robertson, the principal, was, does not appear. For aught that appears the arrangement might have been that Boggs should pay to Mrs. Robertson, at the time of the sale, a certain percentage of the proceeds of the sale, or that he should at that time turn over to Mrs. Robertson, or property in lieu of the proceeds of said sale. It certainly will be presumed that Mrs. Robertson was to be benefitted in same way by the conveyance, rather than that she was not to be benefitted thereby. Why would she have authorized the conveyance if she was not to be benefitted thereby?

A part of counsel's objection to this instrument under this chapter seems to be based on a misconstruction of section 3.

This section reads as follows:

"No person is capable in the law of granting a power, who is not at the same time *capable* of alienating some interest in the land to which the power relates." This section means nothing more that that a person cannot grant a power unless he has the capacity to alieniate real estate, i. e., unless he is 21 years of age and free from any *disability*. This section refers not to the relation of the person to the proper ty to be effected by the power *but to the capacity* of the person. That this is the correct construction of this section seems too plain for argument. As throwing light upon this section let us examine section 37 of this chapter. This reads: "A power may be vested in any person *capable* in law of holding land, but cannot be executed by any other person not capable of alienating lands, except in the single case mentioned in the next section."

The exception contained in the next section is that of a married woman. Can anything be plainer than that this word "capable" is used in this chapter in its ordinary and usual sense?

To put any other construction upon this section would be to give an absurd meaning to it. But if we are right in our position that chapter 44 has no application to powers of attorney, then the construction of section 3; is aside from the question.

It is submitted that there is no error in the rulings of decision of the court below, and that, therefore, the judgment must be affirmed.

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